
TABLE OF CASES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 356.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Plaintiff in Error,*

versus

OHIO VALLEY TIE COMPANY, - - *Defendant in Error.*

REPLY BRIEF FOR PLAINTIFF IN ERROR.

We have just been handed a copy of the brief for defendant in error, and desire to make this reply thereto.

I.

We had not anticipated that the objection to the jurisdiction of this court would again be seriously urged, but counsel devote a very large part, in fact the major part, of their brief to a microscopical examination of the record in the endeavor to show that the federal questions herein involved were not properly raised in the trial court. Even if that were true, though it is not, the principal question which we make is shown by the opinion of the Court of Appeals of Kentucky to have been made

in that court, which, in view of the character of the question, would be sufficient to give this court jurisdiction of it. The Court of Appeals in its opinion says:

> "The appellant next offers as a bar to the prosecution of this action, *the fact that appellee elected to go to the Interstate Commerce Commission with complaint of unreasonable rates, and asked damages on that account. It argues that to permit appellee to recover other or additional damages growing out of or incidental to the acts complained of, will be a direct violation of the Interstate Commerce Act. To support its contention it relies upon Section 9 of the Act.*" (Record, 218.)

This statement alone shows that the defendant specifically made the point in the Court of Appeals that, that as plaintiff had gone before the Interstate Commerce Commission with its complaint of unreasonable rates, and had asked damages therefor, it could not maintain this action in the court in which it was brought to recover "other or additional damages growing out of or incidental to the acts complained of." This was an objection to the judgment which could be made on the face of the pleadings, independent of anything that occurred at the trial—the pleadings did not support the judgment—and such an objection might have been made for the first time in the Court of Appeals, though in fact it had been made in the trial court.

It is true the Court of Appeals meets this question by saying:

> "We do not believe this position is tenable for three reasons: (1) This objection should come by

way of a plea in abatement, and, (2) The Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidently (evidential) merely—neither binding nor conclusive; and (3) The instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights." (Record, 219.)

But of course it is manifest that it was not necessary, nor would it have been proper, to raise the question referred to by a plea in abatement. The plaintiff's petition showed on its face, even on the face of the original petition, that it had carried this complaint to the Interstate Commerce Commission, and that it was there pending (Record, 3 and 4). And its amended petition showed that the Commission had decided the matter and awarded damages (Record, 23 and 24). And this of itself showed that the Sate Court had no jurisdiction to award "other or additional damages growing out of or incidental to the acts complained of." It did not even take the actual decision of the matter by the Commission to show this fact. In Pennsylvania Railroad Co. v. Clark Bros., 238 U. S. 456, this court, in speaking of an action which had been brought in a State Court to recover treble damages under a State statute when there was a complaint pending before the Interstate Commerce Commission, said:

"The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending, and the plaintiff's *right and remedy* were fixed by the Federal Act." (Page 473.)

And manifestly, when it appeared on the very face of plaintiff's own petition, both original and amended, that plaintiff had carried its complaint before the Interstate Commerce Commission, and that therefore the State Court had no jurisdiction to give damages on account of the facts complained of before the Commission, the Court of Appeals could not cut defendant off from insisting upon this proposition in this court by saying that the question ought to have been raised by a "plea in abatement."

In National Mutual B. & L. Assn. v. Brahan, 193 U. S. 635, it was claimed that the federal question was not properly raised, and that the Supreme Court of Mississippi had so decided; and in fact the Supreme Court of Mississippi did so decide, saying that the proceeding in the lower court was "an ingenious but unsuccessful effort to inject the federal question into the record." But this court held that it was not thereby precluded from considering the question. In an opinion by Mr. Justice McKenna, the court said:

> "It is objected that the federal questions presented can not be considered 'because they were not raised in time and in the proper way,' and that the Supreme Court did nothing more than decline to pass on the questions because they had not been raised in the trial court, *as required by the State practice.*
>
> "The Supreme Court considered that plaintiff in error, by the motions to amend the notice, attempted to 'inject' a federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. * * *

> "Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed, plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time. (Citing authorities.) It was also in sufficient form." (Page 646.)

As said by this court in Carter v. Texas, 177 U. S. 442, 447, reaffirmed in Erie Railroad Co. v. Purdy, 185 U. S. 148, 152:

> "The question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State Court, *is itself a federal question,* in the decision of which this court, on writ of error, *is not concluded by the view taken by the highest court of the State.*"

Other cases along the same line were cited and quoted in our brief on the motion to dismiss or affirm, but it does not seem necessary to cite them again.

As a matter of fact, furthermore, the question of the court's jurisdiction to give a judgment for damages based in part upon the charging of alleged extortionate interstate rates was made again and again in the trial court in forms which this court has held to be sufficient, as is shown in our original brief and will hereinafter be mentioned.

II.

As to the assignments of error filed in the Court of Appeals in bringing the case up to this court, the eighth assignment alone, even if there had been no other more specific assignments, would have been sufficient to present the federal question which we have mainly argued, that assignment being as follows:

> "The court erred in holding that the Jefferson Circuit Court of Kentucky had jurisdiction of this action in so far as plaintiff herein seeks to recover damages from defendant on account of violation of the Federal Act to Regulate Commerce." (Record, 253.)

In addition, however, to that general assignment of error, defendant did make other more specific assignments, such as the first, second and third, in which the facts were briefly summarized, the complaint in each assignment being that the court erred in holding that under such facts the plaintiff could recover other or additional damages on account of the matters complained of before the Interstate Commerce Commission (Record, 252, 253).

III.

It is not necessary to repeat here, with any elaboration, the statements we have made in our original brief, showing how the federal questions were raised in the Circuit Court of the State.

By the second paragraph of the demurrer to the original petition defendant objected that as to "so much of the

petition herein as complains of defendant's alleged wrong in publishing in its tariffs for the transportation of interstate freight, rates on cross-ties which are alleged to be extortionate and unreasonable * * * this court has no jurisdiction to give relief for the aforesaid alleged wrong or wrongs," referring to the Act to Regulate Commerce in support of the demurrer. (Record, 20.) And while it is true the court sustained that demurrer, yet it did so in an opinion showing that its ruling was only temporary, to-wit, until the Interstate Commerce Commission should have actually passed upon the *reasonableness of the rates,* the court saying that *"the Commission can not award general damage."* (Record, 23.) Thus the trial court's attention was called at the outset to defendant's objection to its jurisdiction. But as soon as the Commission passed on the reasonableness of the rates involved the court took jurisdiction, and undertook to give additional, or what the court calls "general," damages on account of the same wrongs that had been complained of before the Commission.

Then on the trial defendant moved the court to exclude all the testimony as to the charging of unreasonable rates on interstate shipments, and expressly based this motion on the Act to Regulate Commerce, claiming that "this court has *no jurisdiction*" to consider or determine the *amount of damage* to a shipper on this account (Record, 55, 56). It is difficult to see how the point could more clearly have been brought to the court's attention than by this motion, this court having said, "It is sufficient if it appears from the record that such right

was specially set up and claimed in the State Court *in such manner as to bring it to the attention of the State Court.*" (Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226, 231.)

Counsel suggest that the State Court may have thought that it was not proper practice to make a motion to exclude testimony when the original introduction of it had not been objected to. But it is perfectly manifest that the court did not take any such view of the matter, because it did exclude, and instruct the jury not to consider, the testimony relating to the charge and collection of the alleged excessive rates on 89 cars which had been the subject of the action in the other case in the State Court (Record, 61), although this testimony also had not been objected to when offered. Defendant had moved the court to exclude both (1) the testimony relating to the alleged excessive charges on the 91 cars which were admitted to be interstate shipments, and (2) also the testimony relating to the alleged charges of excessive rates on the 89 cars which were claimed to be intrastate shipments, and which charges had been involved in another case in the State Court. And while the court at first overruled both motions (Record, 56) yet it subsequently took back its ruling as to the last testimony (to-wit, the testimony as to the excessive rates involved in the other case in the State Court), and excluded it (Record, 61); thus showing of course that the court was not influenced by any thought that a motion to exclude testimony could not properly be made because the testimony had not originally been objected to. And we are sure we can safely say, without fear of contradiction, that no case can be

found in Kentucky where any such rule was ever asserted.

Furthermore, this was an objection to the jurisdiction of the court over the subject-matter, and whether it came by way of a demurrer, or by a motion to exclude testimony, or by a motion for an instruction, or in whatever way it came, it was a statement, *distinctly brought to the court's attention and entered of record*, that the defendant objected to the jurisdiction of the court to give damages based on alleged excessive charges of interstate rates, and that the objection was rested upon the Act to Regulate Commerce.

Counsel again make the criticism that the overruling of the motion to exclude this testimony was not made ground of the motion for a new trial. But it was so made within the rulings of the Court of Appeals of Kentucky on the subject of motions for new trial. Of course the court knows that in the Federal courts a motion for a new trial after a jury trial is not necessary at all, and the action of the lower court in granting or overruling such a motion will not be reviewed. And while this is not true in the State practice in Kentucky, and it is true that a motion for a new trial must be made and that an error of the court not involved in any of the grounds for a new trial will not be considered, yet the Court of Appeals has always held that the grounds of the motion for a new trial can be very general, and that it is not necessary to specify particular errors either in rulings upon testimony, or in instructions given or refused. Thus in Meaux v. Meaux, 81 Ky. 475, 479, it held that it was sufficient to assign as grounds for new trial as follows:

"1. Because the court permitted the introduction of incompetent and illegal testimony that was excepted to at the time.

"2. Because the court erred in rejecting important testimony which was offered in his behalf.

"3. Because the court erred in giving the instructions for the defendant.

"4. The court erred in refusing instructions offered by the plaintiff."

And in giving its reasons for this ruling, the court said:

"The court, during the progress of the trial, must be presumed to know the exceptions reserved by counsel in this regard (for without the exceptions the error will not avail), and, when the motion is made, he is informed of the errors by reason of the exceptions, and so in regard to instructions, or error in giving instructions for one party, or refusing to give for the other, is sufficient, because exceptions are taken at the time they are given or rejected. The trial court is informed of the errors by the exception taken during the progress of the trial, and his attention again called to them by the motion and grounds for a new trial." (Page 479.)

Now, manifestly, in the case at bar when a motion was made in writing to exclude certain testimony, and reasons given in writing for the exclusion, and the court overruled this motion, and exceptions were reserved to the court's action, much more must it be presumed that the court is informed of this matter than if various objections were orally made and passed on from time to time during the course of the trial. And in the case at bar, when in the motion for new trial defendant assigned as a

ground that "the court erred in admitting incompetent and irrelevant testimony, objected to by the defendant at the time" (Record, 61), it is a hypertechnical criticism, in view of the rule established by the Court of Appeals of Kentucky, to say that this did not include an objection made by means of a motion to exclude. The motion to exclude was an objection to the testimony, the ground of objection being stated in the motion, and the action of the court in refusing to exclude the testimony and leaving it to be considered by the jury when they should take the case, was an admission of the testimony. It frequently happens in the case of a jury trial that testimony is offered, the objection to which may not appear at the time, and it is common practice to move to exclude testimony and have the court rule upon the same, and we are quite sure it would be a startling revelation to members of the bar in Kentucky, practising under the rule laid down by the Court of Appeals in Brown v. Brown, more than thirty years ago, to learn that the stereotyped form of ground for new trial (to-wit), that the court "erred in admitting incompetent testimony" or "erred in rejecting competent testimony"), does not include a ruling by the court on a motion to exclude testimony, it being understood that these grounds include all adverse rulings of the court on questions of evidence.

As said by the court in Louisville & Nashville Railroad Company v. Mellon, 81 Ky. 460:

> "The object of the motion and grounds for new trial is to call the attention of the trial court to any error that may have been committed at the trial, and

to allow an opportunity, without the expense and delay of an appeal, of correcting it. This being so, all that is necessary in any case is to use such plain and intelligible language in the grounds for new trial as indicates, points out, or shows to the court, with reasonable and ordinary certainty, the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand what errors are meant, and to reconsider the facts or law out of which they are alleged to have grown. Unreasonable particularity or *technical accuracy* in the description of the errors, is not required or practicable." (Pages 406, 407.)

So in the case at bar, the court certainly knew that defendant meant in its motion for a new trial to object to the court's *rulings upon evidence* in allowing to be considered by the jury that which defendant thought was improper and had moved to exclude. And this is all the practice in Kentucky requires.

In this connection counsel quote in their brief (page 27) certain language of the Court of Appeals in the present case concerning a failure to object to testimony, as if the court were there holding that a motion to exclude was not proper when there had been no original objection; but a simple reading of that part of the opinion from which this extract is made will show that the court had absolutely no such meaning. The court was then speaking of testimony which the lower court *did exclude* on motion after it had been admitted without objection, viz., the testimony concerning the alleged excessive charges on the 89 cars involved in the other State Court case; and the court does not intimate that there was anything improper in the practice, but it was simply responding to what it says was an argument of counsel bearing on the excessiveness of the verdict, viz., that while the court did ultimately exclude this testimony and tell the jury not to consider it, yet they had heard it and their verdict was doubtless influenced by it. And in responding to this argument the court says that, however that may be, yet, as the testimony was not objected to when offered, its admission at that time was not reversible error (referring to testimony which the court ultimately excluded).

But defendant did not stop with the mere motion to exclude the testimony as to alleged unreasonable rates, it also *moved the court to instruct the jury* that "It can not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." And at the time of offering this instruction the record shows that defendant said to the court that "In offering this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and the various amendments thereto" (Record, 57). And while counsel for plaintiff criticise the language used by counsel for defendant in elaborating the objection or, in other words, giving the reasons why the objection was well taken, yet the ultimate fact that the defendant did ask the court to instruct the jury that it could not allow any damages for these excessive charges, and that defendant announced that it based the objection on the Federal Act to Regulate Commerce, is indisputable. And, as said by this

court in *Dewey* v. *Des Moines*, 173 U. S. 193, referred to in our original brief,

> "Parties are not confined here to the *same arguments* which were advanced in the courts below upon a federal question there discussed." (Page 197.)

As to counsel's suggestion that this offered instruction seems to have been "intended merely to supplement or explain the instructions given," of course this can not possibly be true. The instruction was offered before the court's instructions were given, as the record shows; for it shows that this and certain other instructions were offered by defendant, that the court refused to give any of them, that defendant excepted to this refusal and, says the record, "*thereupon* the court gave to the jury the following instructions" (Record, 58, 59). What happened is that defendant offered this instruction, and the court refused it, and *gave exactly the opposite of it.*

Thus it is plain that all through the case in the trial court defendant was bringing to the court's attention its objection that the court had no jurisdiction to give damages on account of the charge of excessive rates on interstate shipments; and it is not possible that the court could have failed to understand that defendant did thus object.

But, as said before, aside from all these objections in the trial court, and even if none of them had been made, yet the Court of Appeals, by its opinion, shows that, *in that court,* defendant made the same objection relying upon the Act to Regulate Commerce, and especially sec-

tion 9 of that Act, in support of the objection (Record, 218).

IV.

If we understand the argument of counsel, of which we are by no means sure, they seem to draw a distinction between "charging" and "collecting" and "publishing" and "maintaining" rates, and to contend that plaintiff never claimed damages *in this action* for the *charging or collecting* of excessive rates on interstate shipments, but only for *maintaining* them in its tariffs, and thereby causing plaintiff an indirect damage by deterring it from trying to do business, as distinguished from that more direct damage resulting from the actual *charging and collecting* of excessive rates; and they seem to contend further that the trial court drew this distinction in its instructions and did not allow any damage for excessive rates charged and collected, but only allowed damage resulting from maintaining, in the sense of publishing, excessive rates, excluding any damage resulting from the actual charging and collecting of these rates. And it is in this way that counsel attempt to show, if we understand them, that they are not seeking to recover, and have not recovered, in the present action, any damages growing out of the facts of which they complained before the Interstate Commerce Commission.

This record completely meets and refutes this contention. It conclusively shows that plaintiff did, from the beginning, complain of the fact that defendant had *actually charged and collected* excessive rates on inter-

state shipments, alleging this among the wrongful acts for which it sought damages, and that the court allowed damages on account of these acts and, in its opinion on the motion for a new trial, expressly referred to the *collection* of these alleged unlawful charges, and the damage resulting therefrom, as justification for the amount of the verdict.

Simply read the petition of plaintiff. We find in it, among others, the following allegations of facts alleged by way of showing the wrongs committed by defendant and upon which plaintiff based its claim for $100,000 damages, to-wit:

> "And plaintiff further states that under said interstate tariffs, which apply to cross-ties the fifth class rate, *defendant has collected many thousands of dollars,* upon *interstate* shipments of cross-ties *in excess* of what the freight charges on said shipments would have been if they had been based on the lumber rate, and defendant still holds the full amount of said excessive charges so collected." (Record, 3.)

Again, we find this allegation in the petition:

> "Plaintiff states that by reason of defendant's said malicious and unconscionable action in publishing rates on cross-ties which it knew to be extortionate and which it did not intend to defend in the event that they should be attacked, and in refusing to change said classification, plaintiff has been compelled to employ attorneys to file complaints before the Interstate Commerce Commission *to obtain reparation on account of said extortionate charges,* and plaintiff will be compelled to pay reasonable fees to said attorneys in the prosecution of said complaints, *which are now pending.*" (Record, 9.)

From the allegation just quoted we see that plaintiff was alleging, as one element of its damage, the fact that it had been compelled to employ attorneys to appear before the Commission to complain about these charges that had already been made and collected, and to obtain reparation; these attorney's fees being simply *part* of the damage claimed to have resulted from that wrong, and which the court afterwards allowed by its instructions and the jury gave by its verdict.

Then again, we find this allegation in the petition:

> "Plaintiff further states that while defendant knew that plaintiff would be able to finally *recover the said freight charges collected by defendant* in excess of reasonable charges the defendant knew that said excessive charges could and would be withheld by defendant for a long period of time, and that plaintiff *would be deprived of the use in its business of that much of its capital*, and that its business would thus be hampered and crippled. And plaintiff further states that by reason of said malicious acts of defendant a *substantial part of plaintiff's capital is now wrongfully held by defendant*, and plaintiff's business, as defendant maliciously intended that it should be, has been seriously crippled by defendant's said malicious acts, and plaintiff by reason of said acts *has been compelled to borrow large sums of money* which but for said acts it would not have been compelled to borrow, and to pay large sums as interest on said borrowed capital, which but for said acts it would not have been compelled to pay, and plaintiff by reason of defendant's said malicious acts *has been deprived of the use not only of the freight charges*, paid by plaintiff, in excess of what said charges would have been if based upon the lumber rate, but has also been deprived of the use of said money paid as interest. Plaintiff further states that

> by reason of defendant's said malicious acts and the said *tying up of plaintiff's capital, plaintiff's credit has been greatly impaired,"* etc. (Pages 10, 11.)

Thus we see that plaintiff, in its petition, specifically complained, not merely of the "maintaining," in the sense of publishing in its tariffs, these excessive interstate rates, but complained of the actual *charging and collecting* of them, and of the fact that by reason thereof it had been compelled to employ attorneys to appear before the Interstate Commerce Commission and seek reparation, and that its credit had been impaired, and that by reason of these things its business had been damaged.

Then, in the amended petition wherein plaintiff pleaded the finding of the Interstate Commerce Commission, it makes this statement, after referring to this order of the Commission:

> "And plaintiff further states that the interstate rates on ties of the publication *and collection* of which it complains by its original petition, are the rates condemned by said order of April 8, 1912." (Record, 26.)

It is, therefore, indisputably clear that plaintiff, in its petition, did not seek damages based only upon the fact that defendant carried in its tariffs these excessive rates, but that it actually *charged* them to plaintiff and *collected* them from it.

Then on the trial of the case before the jury, counsel brought out from their principal witness, plaintiff's President, Mr. Bush, the fact of these excessive charges and collections, he saying,

"They had all told, in those overcharge claims, $20,000 at one time." (Record, 117.)

And the court's instruction to the jury, while it refers to maintaining rates, refers also to such rates as "were *charged plaintiff*" saying to the jury,

> "If you believe from the evidence in this case that the rates on cross-ties which were found to be unreasonable by the Interstate Commerce Commission by its order of April 8, 1912, were, to the extent said rates exceeded the rates then in force on lumber, wilfully and maliciously maintained by defendant with the intent to injure plantiff's business of buying and selling ties, or with the intent to deter plaintiff from buying ties along the line of defendant's railroad, and that said rates *which were charged plaintiff* were, when so maintained, known by defendant to be unreasonable to said extent * * * and that defendant by such act or acts, if any were committed, did *tie up a part of plaintiff's capital,* or did impair and injure plaintiff's business or credit * * * then you will find for the plaintiff," etc. (Record, 59.)

Thus it will be seen that the court refers to the "rates which were charged plaintiff" and to the tying up of plaintiff's capital, and there is absolutely nothing in the instruction which tells the jury to exclude that damage which was claimed to have been done by charging and collecting these excessive rates. It will be observed that there is no *time limit* in the instruction. It covers all the time during which these rates were maintained, from the time defendant began charging and collecting them in the spring of 1910, more than a year before plaintiff's application to the Commission, down as long as they were maintained.

It is true the court said to the jury "you must not include in your verdict any sum or sums representing the difference or differences between the rate for hauling lumber and the fifth class rate paid by plaintiff on shipments of cross-ties" (Instruction No. 5). But it did not tell the jury that they could not include those other damages of which plaintiff complained, resulting from these excessive charges, such as attorney's fees that had to be paid to recover them, and such as the impairment of credit resulting from being kept out of its money, and general damage to its business by not having this money which it could turn over two or three times a year, as plaintiff's president testified it was accustomed to do, and by which it would make more than legal interest.

And that the court thus understood its own instructions is perfectly manifest from its opinion overruling the motion for a new trial. In that opinion, in giving the court's reasons for holding that the verdict could not be set aside as excessive, the court in referring to these excessive rates, says "*These charges were enforced* by the railroad company against the plaintiff, and the money was held until, from time to time after the hearing by the Interstate Commerce Commission, restitution was adjudged and so *plaintiff was kept out of large sums of money by the defendant*" (Record, 50); thus showing that the court understood that the jury were allowed to find damages based, in part, on the fact that plaintiff had been *compelled to pay defendant these excessive charges;* this being one of the reasons assigned by the court for upholding the jury's verdict.

And the Court of Appeals itself refers to the same consideration in treating of the matter of the amount of the jury's verdict. Thus the Court of Appeals says:

> "As to the complaint that the verdict is excessive, it is directed at the $50,000 for injury to plaintiff's credit, and $5,000 damages to cross-ties, and we may say again, that before we are authorized to reverse for that reason the damages must be so excessive as to strike one at first blush as being the result of passion and prejudice. * * * *In considering the extent of damage* it will be well to recall that *these wrongful practices of appellant began in the year 1910,* and culminated during appellee's fiscal year beginning September 1, 1911. * * * For at least two years appellee was deprived of profit from this borrowed capital by the injury to its credit, and *was also deprived of more than $12,000 of its invested capital, by way of the excessive freight charges withheld by appellant.* * * * *The jury had a right to take these things into consideration, and to conclude that simple interest would be poor compensation for capital thus tied up and credit so injured.*" (Record, 215, 216.)

It is thus seen that the Court of Appeals in its consideration of the facts said to justify the jury's verdict, expressly takes into consideration those alleged wrongful practices of defendant which the court says *began in the year 1910,* which was the collection from plaintiff of the excessive interstate charges, and comments particularly upon the fact that plaintiff had been deprived of a large amount of its invested capital by reason of these excessive charges and collections.

We submit, therefore, that it is idle for counsel to contend that plaintiff did not ask and that the court did

not allow damages in this case resulting from the charging and collecting of excessive interstate rates by defendant, being in part the very excess rates complained of before the Interstate Commerce Commission.

So much for what plaintiff claimed and was allowed in the case at bar.

Now, on the other hand, when we turn to the proceeding before the Interstate Commerce Commission, we see from plaintiff's own statement in its petition that it there complained both of the "publication" and the "collection" of these excessive rates and prayed that both be enjoined, and says that "it filed its complaint before the Interstate Commerce Commission *complaining of the rates published and collected* on said shipments of ties, and praying that defendant be required to cease and desist from *charging or collecting* for the transportation of cross-ties in carloads," etc. (Record, 24.)

The whole subject, therefore, of the *publication* and the *collection* and the *maintenance* of these alleged excessive interstate rates, was before the Commission and complained of by plaintiff; and whatever damages plaintiff sustained thereby the Commission could allow, or, to use the language of this court in speaking of such damages, "whatever they were, they could be recovered."

It is thus perfectly plain that plaintiff's recovery in the case at bar was based, certainly in part, and in a very large part, upon the very alleged wrongs complained of before the Commission. And the Court of Appeals, in the concluding paragraph of its opinion, recognizes this fact, saying:

"In our opinion, the fact that the Interstate Commerce Commission may have recommended the payment of *special damage* which flows from violation of federal law is no reason why the State Court may not take cognizance of a suit *based in part upon another result of that act* which, when connected with many other acts, of a different nature, will show a wilful and malicious purpose, and give rise to this common-law cause of action." (Record, 222.)

V.

In response to the statement that the refusal to accept the cars of the Pennsylvania Railroad Company for loading plaintiff's ties, and the requirements that these ties be loaded in defendant's own cars and unloaded at Louisville, were for the purpose of protecting defendant's published interstate rates, which plaintiff was seeking to evade, counsel say that this statement is manifestly disingenious. And in order to show this they say:

"There was no obstacle to the collection of the interstate rate on shipments delivered on the tracks of the Pennsylvania or the Big Four, and there was no way in which plaintiff could evade the payment of that rate if the defendant chose to require its payment."

This record, and plaintiff's own petition, show that the plaintiff did find a way to evade the payment of the interstate rate, which "the defendant chose to require." The petition shows that plaintiff obtained from the State Court a *mandatory injunction* "enjoining and ordering the defendant, among other things, to deliver immediately upon their arrival at Louisville, Ky., to the Pennsylvania Company, *upon the payment of freight charges based on*

the intrastate rates, and on the tracks controlled by the Pennsylvania Terminal Railway Company in Louisville, Ky., all cars of cross-ties which the defendant may receive consigned to this plaintiff, care of Pennsylvania Company." And, says the petition "said order of injunction now is and has been at all times since it was entered, in full force and effect." (Record, 6.)

This mandatory injunction was a very decided "*obstacle* to the collection of the interstate rate on shipments delivered on the tracks of the Pennsylvania." And it was only after that injunction was granted at plaintiff's instance that the defendant issued to its agents a circular of which plaintiff has greatly complained, directing its agents not to ship cross-ties consigned to plaintiff "*care of Pennsylvania Company,*" but to ship them only to plaintiff at Louisville; defendant's purpose being of course to prevent these cars of ties being delivered to the Pennsylvania Company, when it was satisfied that if thus delivered the cars would be run out of the State with the ties in them. And fearing that there might be another application for a mandatory injunction in a different form, requiring defendant absolutely to deliver all cars to the Pennsylvania or the Big Four on plaintiff's demand whatever might be the form of the billing, the defendant insisted on loading the ties into its own cars, believing that it could then refuse, and that the court would not require it, to deliver its own cars into the possession of the Pennsylvania Company (under the principle settled in Louisville & Nashville Railroad Co. v. Central Stock Yards Co., 212 U. S. 132). And it insisted that

as plaintiff claimed these shipments to be intrastate shipments, then defendant's cars must stop at Louisville and be there unloaded. And, while it is true, as counsel say, that a carrier can not by breaking bulk make that an intrastate shipment which would otherwise have been an interstate shipment, yet, as plaintiff claimed that the shipments were intrastate, and that the transportation was to end at Louisville, defendant did, and had the right to do, all that was in its power to see that the shipments were what they were claimed to be, and to prevent its own rolling stock from being used in the execution of a subterfuge.

Counsel say that the petition alleges that after the interstate rates and intrastate rates were made the same, in compliance with the order of the Interstate Commerce Commission, defendant continued to refuse to permit its cars to leave its line, and they say this is not denied in the answer, the denial being merely that this was *maliciously* done. This again is simply a technical criticism which counsel make upon the pleading. The second amended petition alleged that since the order of the Interstate Commerce Commission became effective "the defendant has continued to wilfully and maliciously annoy and harass the plaintiff as alleged in the petition," and then adds *as a specification of this* that "defendant has continued to wilfully and maliciously refuse to deliver upon the tracks of the Pennsylvania Terminal Railway Company its cars loaded with ties consigned to plaintiff in care of the Pennsylvania Company," etc. (Record, 33.) The answer of defendant denies "that it

has continued to wilfully or maliciously *or at all* annoy or harass plaintiff, as alleged in the petition, *or at all,* or has maliciously refused to deliver upon the tracks of the Pennsylvania Terminal Railway Company its cars loaded with cross-ties," etc. (Record, 42.) Thus it denies in the most complete way possible the general allegation that it has continued maliciously, *or at all,* to harass plaintiff as complained of in the petition; but counsel's criticism is evidently based on the fact that when defendant, after denying in this way the general charge, came to deny the specification about refusing to deliver the cars, it failed to repeat, after the word maliciously, the words, "or at all"; though it will be observed that as to the charge that it continued wilfully to refuse to accept cars of the Pennsylvania Company for loading, the answer does deny that "it has continued to wilfully or maliciously, *or at all,* refuse to accept cars of the Pennsylvania Company or cars under control of the Pennsylvania Terminal Railway offered to defendant for shipment of plaintiff's ties to Louisville" (Record, 43). In other words, counsel have simply picked out one allegation in this long answer where defendant failed to insert in its denial the words, "or at all," and on this they base the statement that defendant does not deny that even after the Interstate Commerce Commission had required the interstate rate and the intrastate rate to be the same, defendant continued its practice of refusing to allow cars to go through to destination loaded with ties.

Before concluding this subject, and in connection with the circular which defendant issued to its agents after

the mandatory injunction was issued, counsel in their brief (page 13) say this rendered it impossible for plaintiff to ship to its Louisville customers, such as the Louisville Street Railway. But it is perfectly manifest that the circular had no such effect. It was manifestly dealing with shipments to, or in care of, other railroads entering Louisville, and not with local concerns in Louisville; and plaintiff's President, Mr. Bush, though testifying that when he got the circular he went to the officials of defendant to inquire what it meant, admits on cross-examination that he did not even ask if it meant that he could not ship to local customers at Louisville. And when asked why it was, if he went to inquire what it meant, he did not ask if it meant to forbid his shipping to these local customers, his only response was that he construed it literally to mean that he could not. (Record, 140.)

VI.

On the subject of that part of the damages plaintiff was allowed to recover because defendant refused to allow its cars to be taken out of its possession and sent into other States on other lines, counsel say defendant did not *plead* that this would deprive it of its property without due process of law, but made this federal question on motion for new trial. But this court has expressly held that such a question does not have to be pleaded, and that it may be made on a motion for a new trial (Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226, 231), and the profession have a right to rely on rulings

of this kind made by the court on such questions of practice.

Again counsel say this question was not urged in the *petition for rehearing* filed in the Court of Appeals of Kentucky. But there is no law, rule, or practice, that requires a petition for rehearing to be filed at all—much less that every question in the case shall be argued in it if one is filed.

They say also this question was not "pressed" upon the motion for new trial. They do not mean it was not assigned as a ground for the motion—for it was—but simply that it was not pressed in the *argument* on the motion. But there is no rule requiring a motion for new trial to be argued at all, either orally or by brief; and many of them are not argued at all; and if one is argued, counsel can argue what questions they please, without incurring the penalty of waiving any point they may not argue.

As to counsel's reference, on the merits of this question, to Michigan Central R. R. Co. v. Michigan R. R. Commission, 236 U. S. 615, 631, the answer is that that case simply held that a certain rule of the State Railroad Commission as to the handling of cars was a reasonable rule, thus bringing the case within the principle of Louisville & Nashville Railroad Company v. Central Stock Yards, 212 U. S. 143, and the court decided the case expressly upon that ground. But in the case at bar there was no such rule involved. The law on that subject in Kentucky stands today exactly as it did when the Central Stock Yards case (which arose in Kentucky) was decided.

VII.

There are many other matters involved in the brief of counsel for plaintiff, upon which we are in absolute disagreement. But of course it is not the purpose of this reply brief to reargue the whole case, but simply to reply to matters in the brief of opposing counsel, which seem not to have been sufficiently anticipated in our original brief.

HELM BRUCE,
For Plaintiff in Error.

H. L. STONE,
Of Counsel.

April 27, 1916.

SYNOPSIS AND INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 356.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a writ of error to the Court of Appeals of Kentucky, to review a judgment of that court affirming a judgment of the Jefferson Circuit Court at Louisville, Ky., for $56,971.56, based upon the verdict of a jury for that amount.

The action was brought by the Ohio Valley Tie Company, the defendant in error, against the Louisville & Nashville

Railroad Company, the plaintiff in error, to recover damages for the injury to plaintiff's business, which was that of buying, selling, and shipping railroad cross-ties. For convenience the defendant in error is referred to in this brief as the plaintiff and the plaintiff in error as the defendant.

The plaintiff alleged that the damages claimed resulted from a combination of acts committed wilfully and maliciously for the purpose of injuring the plaintiff's business and driving plaintiff from the market as a buyer of cross-ties in competition with defendant. The action was in the nature of an action for an assault on plaintiff's business. The jury stated in its verdict that it awarded $50,000 on account of injury to business, $5,000 for injury to cross-ties, and the remainder for expenses incurred by reason of the wrongful acts, including counsel fees of $1,000, which it was alleged in the petition were contemplated by defendant as a part of the damages which would result from its malicious acts.

The jury was permitted by the trial court to consider, in arriving at its verdict, four acts of the defendant, committed wilfully and maliciously with the intent to injure plaintiff's business and to prevent it from buying ties along the line of defendant's right of way, to wit:

1. The maintenance of excessive and unreasonable rates condemned by the Interstate Commerce Commission;

2. The failure and refusal to furnish cars requested by plaintiff for shipment of its ties, when it might, by the exercise of proper diligence, have so furnished the cars for such shipments without interference with the rights of others;

3. The refusal to accept the cars of another carrier which plaintiff tendered for shipment of its ties when defendant's own cars were not available, and when defendant was accustomed to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions; and

4. The requirement that plaintiff should transfer and unload cars arriving over defendant's line at Louisville, and the refusal to allow such cars to go forward on connecting lines, while permitting the shipments of other persons to go forward on its cars on connecting lines under substantially similar circumstances and conditions.

Of these acts the first relates solely to interstate shipments and the others to both interstate and intrastate shipments.

The rates referred to were proportional rates applicable only to shipments to Louisville for points beyond in other States. The Railroad Commission of Kentucky, by a general order made in the year 1905, had prohibited the railroads from charging higher rates on intrastate shipments of cross-ties than they charged on such shipments of lumber, and defendant had complied with that order (Rec., p. 67). The defendant filed a special demurrer to two parts of the original petition: (1) to so much of the petition as complained of the alleged excessive charges on 89 cars of cross-ties, because it appeared from the petition that another action was pending in the same court between plaintiff and defendant, seeking to recover for the same alleged wrong, and (2) also to so much of the petition as complained of defendant's alleged wrong in charging unreasonable rates on interstate shipments of cross-ties because under the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and its various amendments, the only tribunal having any power or right to give redress for such alleged wrongs is the Interstate Commerce Commission. The rates on the 89 cars of ties involved in the other action in the state court were finally excluded from the consideration of the jury (Rec., p. 61), and need not be considered here. The court overruled the first paragraph of that demurrer, but sustained the second paragraph upon the ground that the Interstate Commerce Commission had the exclusive right to determine whether or not certain interstate rates were unreasonable.

At the time this action was instituted there was pending before the Interstate Commerce Commission a complaint by which the plaintiff attacked the proportional rates on cross-ties from points in Kentucky and Tennessee to Louisville "for beyond," and sought reparation in the sum of $6,198 on account of extortionate charges collected in the past on 91 carloads of ties to which those rates applied. April 8, 1912, prior to the filing of defendant's answer in this action, the Commission in that proceeding filed a report condemning the rates under which the shipments were made on account of which plaintiff's claim of $6,198 had arisen and awarded reparation for that amount, and plaintiff thereupon filed an amended petition setting up those facts (Rec., p. 23). While plaintiff alleged in the amended petition that the rates condemned by the Commission were the same interstate rates referred to in the original petition, it also alleged that after the complaint was filed before the Commission additional shipments were made by plaintiff to which those rates were applied. To that pleading defendant did not file a demurrer, but it did by its answer deny that the rates so condemned by the Commission were unreasonable or were wilfully or maliciously published (Rec., p. 41). Defendant by its answer further denied that it had wilfully or maliciously delayed to furnish cars for plaintiff's shipments, or to accept cars of the Pennsylvania tendered for that purpose, and also alleged that since the institution of this action plaintiff had prosecuted to judgment the action to recover alleged excessive charges on 89 cars of cross-ties.

Upon the trial the defendant objected and excepted to the instructions given by the court, but did not attempt by those objections or exceptions at that time to raise any federal question (Rec., p. 59). Upon its motion for a new trial defendant attempted to raise a federal question as to that part of the first instruction given, which authorized the jury to consider as an element of damage the action of defendant in refusing to permit its cars to leave its line when loaded with

plaintiff's shipments, provided they should find that defendant was accustomed to permit its cars to leave its line when loaded with the shipments of other shippers under substantially similar circumstances and conditions (Rec., p. 47). While defendant at the time did not by its objections or exceptions to instructions given attempt to raise any federal question, it did attempt upon the trial to raise certain federal questions by its requests for instructions, as shown by the following excerpt from the bill of exceptions (Rec., pp. 57-58):

> "1. The court instructs the jury that it cannot in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." (And at the time defendant offered this instruction No. 1 it said to the court in writing: In offering this instruction defendant relies upon the federal act to regulate commerce, approved Feb'y 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment of freight is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the reasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission.)
>
> "2. The jury are instructed that they cannot allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon the 5th-class freight for the shipment of cross-ties involved in the action of Ohio Valley Tie Co. *vs.* L. & N. R. R. Co. in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff for certain alleged excess charges of freight, and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending." (And at the time defendant offered this instruction No. 2, it said to the court in writing: In

moving the court to give the jury this instruction, defendant relies upon the federal act to regulate commerce approved Feb'y 4, 1887, and all amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the reasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. And that this court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same. And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, cannot further recover any additional sum herein, based on the same alleged wrongful acts.)

"3. The court instructs the jury that defendant, Louisville & Nashville R. R. Co. had a right to keep its cars on its own tracks, and it was not therefore guilty of any wrong in refusing to allow its cars to go off its own tracks.

"4. The court instructs the jury that under the federal act to regulate commerce, the defendant railroad company was required by said act to charge and to collect from all shippers of interstate traffic the rates of freight fixed by its tariff which was at the time of shipment on file and in effect with the Interstate Commerce Commission at Washington, and it would have been a violation of law to have charged or collected from any such shipper a rate different from that which, at the time of the shipment, was fixed by such railroad company's tariff, then on file with the Interstate Commerce Commission and in effect or to have connived at any arrangement whereby the payment of the rate fixed by such tariff should be evaded."

Only the first and fourth of the requested instructions need now be considered, as the court at the close of the argument excluded from the consideration of the jury the rates to which the second instruction related (Rec., p. 61),

and no federal question was attempted to be raised by the third requested instruction.

When defendant reached the Court of Appeals of Kentucky it did not rely upon the alleged errors of the trial court in giving and refusing instructions, but insisted in that court upon the face of the pleadings that it was the duty of plaintiff to elect whether it would go to the Interstate Commerce Commission for its damages or would go to the courts, and that as plaintiff had elected to go to the Commission for damages it was compelled to claim all its damages before the Commission. To this contention the court made answer as follows (Rec., p. 219):

> "We do not believe this position is tenable for three reasons: (1) This objection should come by way of a plea in abatement; and (2) the Interstate Commerce Commission as to damages is not a court, and its finding in that regard is evidential merely—neither binding nor conclusive; and (3) the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess freights."

The court also said in the same connection:

> "Manifestly the action in the state court, and the complaint before the Commission were of a special nature, seeking special relief not obtainable elsewhere or otherwise. But this action is to recover general damages as a result of numerous wrongful acts, and although the overcharges which form the basis of the special suit and the complaint above referred to, are among the many wrongs alleged in the petition, we cannot see how judgment or proceedings in the special actions should operate as a bar to the prosecution of this, or the fact that they were then pending, could serve to abate it. Although they were between the same parties, the causes of action were not identical."

The assignments of error are twelve in number, but they may be reduced to six propositions:

(1) That it was error to award damages for the same wrongs for which the Interstate Commerce Commission had awarded damages after plaintiff had accepted payment of the damages so awarded; (2) that the court erred in holding that defendant, by failing to file a plea in abatement, waived its right to claim that plaintiff elected to demand all its damages in the proceeding before the Commission; (3) that the court erred in holding that the Jefferson Circuit Court had jurisdiction of this action in so far as plaintiff seeks to recover damages on account of a violation of the federal act to regulate commerce; (4) that the court erred in approving the refusal of the trial court to instruct the jury that it could not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties; (5) that it was error to approve the refusal of the trial court to instruct the jury that it would have been a violation of the federal act to regulate commerce for defendant to collect less than the published rate; (6) that the approval of instructions to the jury authorizing a recovery because of defendant's refusal to permit its cars to leave its line deprived defendant of its property without due process of law.

The two principal grounds relied upon for reversal are: (1) The payment of the order of reparation was a bar to this action, and (2) the state court did not have jurisdiction of the action.

THE EVIDENCE.

While this court is not concerned with the sufficiency of the evidence to support the verdict, or as to whether or not the damages are excessive, a brief review of the evidence is necessary to a clear understanding of the grounds upon which defendant relies for a reversal of the judgment and to enable the court to determine whether or not defendant

has been deprived of any federal right which was "specially claimed" in the state court.

The petition in this action was filed December 9, 1911, in the Jefferson Circuit Court at Louisville, Ky. On September 15, 1911, plaintiff had filed before the Interstate Commerce Commission the complaint hereinbefore referred to, attacking defendant's published interstate rates on cross-ties from points in Kentucky and Tennessee to Louisville when the shipments were destined to points beyond Louisville, and praying for an order of reparation in the sum of $6,198.00 on account of unreasonable charges on 91 cars of cross-ties shipped within two years prior to the filing of the complaint, the amount named being the excess of the freight charges on such shipments over what the charges would have been if the defendant had applied its lumber rates. The rates in fact applied were the fifth-class rates, cross-ties being rated fifth class, and defendant having refused to give them a commodity rate, as it had done in the case of lumber, the result being that in some cases the rates charged on cross-ties were four times as great as the rates on lumber made from the same kind of wood from which the ties were made.

To illustrate, from Smiths Grove, Ky., to Louisville, Ky., "for beyond," the interstate rate on lumber was 8 cents per 100 pounds, while the interstate rate on cross-ties was 32 cents. A cross-tie of the size which plaintiff sold to the Pennsylvania Railroad weighs about 200 pounds, and the value in Louisville of a whiteoak tie of that size was 82 cents at the time of the trial, while the value of ties of the same size made of inferior woods, and known as creosote ties, was only 55 cents each; and it appeared that a large part of plaintiff's shipments were of ties of that value. The freight charges on such a tie shipped from Smiths Grove to Louisville in interstate commerce was 64 cents, or 9 cents more than the value of the tie at Louisville. The value per thousand feet of quarter-sawed oak is almost four times the value of oak cross-ties, and a car of quarter-sawed oak

worth $750.00 could be shipped from Smiths Grove to Louisville, when destined to points in other States, for $32.00, while the freight charges on a car of whiteoak cross-ties worth in Louisville $200.00, or a car of creosote ties worth in Louisville $137.50, would be $160.00. The same ties when destined to Louisville for delivery there were charged only $32.00, the same as lumber (Rec., p. 111). On 89 cars of ties freight charges of $11,396.64 represented an excess of $8,127.63 over what the charges would have been at the lumber rate (Rec., p. 2).

On January 13, 1888, the Interstate Commerce Commission, in the case of *Reynolds vs. Western N. Y. & Pa. Ry. Co.*, 1 I. C. C., 393, 400, made an order requiring the carrier to cease and desist from charging a higher rate for the transportation of cross-ties between certain points than it charged for the transportation of lumber between the same points at the same time. In that case the Commission said (Rec., p. 95):

> "Rates established by a common carrier under the influence of a desire to keep upon its line a material for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified either in morals or in law. Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the common carrier has no right to prevent his doing so by disproportionate or unreasonable rates. This the defendants in the present case have been attempting to do."

While the report of the Commission in that case was not permitted to go to the jury as evidence, because it was filed in a proceeding to which the defendant in this case was not a party, the report is in the record (Rec., pp. 90, 95).

The report of the Commission in the case of *Chicago Car Lumber Co. vs. Louisville & Nashville R. Co.*, 19 I. C. C., 438, was, however, admitted as evidence, and in that case, which was decided October 10, 1910, the Commission said, p. 439:

"The Commission has repeatedly held that the rate on ties should not exceed the rate on lumber from which they are made; and while the defendant does not always equalize lumber and tie rates, it has usually done so when requested by complainant." (Rec., p. 89.)

In the case in which the order of reparation referred to in the amended petition was entered, the defendant made only a formal defense, as it offered no evidence and pre sented no argument (Rec., p. 101).

In view of the repeated rulings of the Interstate Commerce Commission and of the general order of the Railroad Commission of Kentucky made in 1905, prohibiting higher rates on cross-ties than on lumber, to which we have referred, the plaintiff believed, when it began to do business on defendant's line in 1908, that it would have the same rates on cross-ties that were given on lumber, and Mr. Bush, the plaintiff's president, says that he went into business on the line of the defendant on the supposition that the lumber rate applied to ties (Rec., pp. 66, 67). During 1908 and 1909 plaintiff shipped approximately 2,500 carloads of ties from points on defendant's line in Kentucky to points in other States, and on those shipments plaintiff paid the lumber rate. In February, 1910, however, defendant began to charge the fifth-class rate, although that had been all the time the published rate (Rec., p. 73). The defendant did not explain why, for two years after plaintiff began business, it failed to apply its published rates to plaintiff's shipments of cross-ties, but it seems clear that defendant had not excepted ties from the fifth class, hoping thereby to deter persons on its line from shipping ties, and that the real reason it had not collected the fifth-class rate was that it knew that if complaint should be made it would be required to give cross-ties a commodity rate not higher than the lumber rate, and no doubt thought it wise not to invite a complaint so long as shipments were not greater in volume than they then were. It probably believed also that as the charging of a

higher rate on ties than on lumber had been so severely condemned by the Commission it would be quite safe in applying the lumber rate, although it was departing from its published tariff. When plaintiff discovered that defendant was assessing the fifth-class rate on shipments of cross-ties which it was then making to the Nickel Plate (New York, Chicago & St. Louis Railroad) it began to ship the ties to the "Ohio Valley Tie Company," in care of the Big Four Railroad, and then to reconsign the cars to the Nickel Plate, *first notifying the defendant that it intended to so consign the cars,* and upon the ties so shipped the defendant for some time charged only the lumber rate (Rec., p. 75). Before that change, however, in the method of handling those shipments defendant had collected freight charges at the fifth-class rate which exceeded in the sum of $7,898.00 the freight charges which would have accrued if the lumber rate had been charged. The plaintiff presented a claim for that amount, and defendant paid $1,700.00 of the claim, but refused to pay the remaining $6,198.00, which was the amount for which plaintiff sought reparation by its complaint filed with the Interstate Commerce Commission in September, 1911.

After defendant began to assess the fifth-class rate on ties shipped to Louisville for purchasing carriers in care of other carriers plaintiff changed its contracts with the Pennsylvania and the Big Four so as to provide for delivery of ties to them at Louisville, as they had their own terminals there. After this was done defendant in August, 1911, refused to deliver several cars of cross-ties shipped by plaintiff and billed to the Pennsylvania at Louisville, unless plaintiff would pay the fifth-class rate, and plaintiff thereupon procured an injunction requiring the delivery of the cars. On 89 other cars, however, plaintiff had paid the overcharges demanded, which amounted to about $8,100.00, and brought suit in the state court to recover the amount (Rec., p. 79). Thereafter, defendant charged only the lumber rate on ties billed to the Pennsylvania Railroad Company, but it re-

uired the ties to be unloaded and transferred to other cars, acing upon plaintiff the burden of transferring the ties Rec., p. 81). Plaintiff then tendered Pennsylvania cars for e shipment of ties, but defendant refused to accept those rs, although it had been the custom of defendant to accept e cars of the Pennsylvania for such shipments prior to that ntroversy (Rec., p. 82).

Defendant about that time refused to continue to permit es consigned to it in care of the Big Four for reconsign-ent to the Nickel Plate to move to Louisville upon the mber rate, and plaintiff was therefore compelled to give up e Nickel Plate as a customer, as it could not afford to pay e extortionate rates demanded, even though it knew it uld finally get back the excess over the lumber rate (Rec., 77). September 29, 1911, defendant issued a circular to l its agents in Kentucky instructing them that shipments ties consigned to plaintiff in care of various railroads were ot to be accepted, but stating that ties consigned to plaintiff to any of the railroads named could be accepted, it being ated in the circular that it was very important that these structions "be followed to the letter." Upon inquiry plain-f was informed that consignments to the Ohio Valley Tie ompany at Louisville meant shipments to the team track the defendant and nothing more (Rec., p. 103). Plaintiff d several large customers at Louisville, other than the unk lines referred to, the Louisville Street Railway being nong the number, and this circular made it impossible for aintiff to ship to those customers, as it could not afford to load the ties on the team track and haul them across the y to the yards of the purchasers, on whose sidings defend-t had formerly been accustomed to make deliveries for aintiff.

Plaintiff's controversy with defendant began in the sum-er of 1911, and although from September, 1910, to Sep-mber, 1911, plaintiff had handled 1,300,000 ties, yet from ptember, 1911, to September, 1912, because of reduced pital it handled less than 1,000,000 ties (Rec., p. 117).

Plaintiff's business had steadily increased, both in volume and profit, from the time it began to purchase ties on defendant's line in 1908, and it had never shown a loss for any year prior to the year ended September 1, 1912. At the time plaintiff's controversy with defendant began, its investment in timber and ties on that part of defendant's line from which defendant sought to deter plaintiff from making shipments amounted to $75,000.00 (Rec., p. 78), and that investment defendant tied up not only by continuing to keep in effect the extortionate fifth-class rate on ties, so that plaintiff was compelled to give up its most valuable customer, but by refusing to furnish cars for the shipment of plaintiff's ties, or to accept cars of other lines for that purpose (Rec., pp. 118, 121). Not only did defendant refuse to either furnish its own cars or to accept Pennsylvania cars for plaintiff's shipments, but in the case of 34 Pennsylvania cars inadvertently accepted by some of defendant's agents for plaintiff's shipments defendant unloaded the ties when they reached Louisville and loaded them on defendant's cars before they were switched to the Pennsylvania tracks, being willing to incur that expense in order to impose upon plaintiff the expense of transferring the ties to Pennsylvania cars (Rec., p. 114). The result of this persistent attack upon plaintiff's business was to convert a profit of $28,000.00 for the year ended September 1, 1911, into a loss of $27,000.00 for the year ended September 1, 1912 (Rec., pp. 65-66).

The only excuse given by defendant for refusing to either furnish cars for plaintiff's shipments or to accept the cars of the Pennsylvania Railroad when tendered for that purpose or for requiring plaintiff to unload its shipments at Louisville and reload them in Pennsylvania cars, is that it was merely seeking to protect its interstate rates. This claim, however, is manifestly disingenuous. There was no obstacle to the collection of the interstate rate on shipments delivered on the tracks of the Pennsylvania or the Big Four, and there was

no way in which plaintiff could evade the payment of that rate if the defendant chose to require its payment. Besides, the defendant could not by breaking of bulk make that an intrastate shipment which would otherwise have been an interstate shipment, it being provided by Section 7 of the Act that "no break of bulk, stoppage or interruption" made by a common carrier in the movement of traffic "shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any provisions of the Act." It was just as much the duty of defendant, therefore, to collect the interstate rate on each of the shipments which was taken from defendant's cars and loaded upon the cars of the Pennsylvania or the Big Four as it was to collect that rate upon shipments which went forward in the same cars in which they reached Louisville. It was alleged in plaintiff's second amended petition that after the interstate rates and the intrastate rates were made the same, in compliance with the order of the Interstate Commerce Commission, defendant continued to refuse to permit its cars to leave its line (Rec., p. 33), and this was not denied, the denial being merely that this was *maliciously* done (Rec., p. 42). But if an issue was made as to that matter the question of fact was for the State court, and that court, as we must assume, found every fact necessary to support the conclusion that defendant refused to permit its cars to leave its line when loaded with shipments made by plaintiff while permitting its cars to leave its line when loaded with similar shipments made by other persons. There was testimony tending to show that defendant's practices continued to be the same, after the interstate rates were made the same as the intrastate rates, as they had been before (Rec., pp. 122, 143), and that defendant wilfully refused to furnish cars is established by undisputed testimony (Rec.,

pp. 121, 141-143, 150-152, 161, 165). The fact that defendant did not wish to permit its cars to leave its line could not justify its refusal to furnish cars altogether, since it did require such of its cars as it did furnish to be unloaded at Louisville. It is also difficult to understand how the defendant's duty to protect its maliciously published rates could justify its refusal to accept the cars of the Pennsylvania Railroad tendered for plaintiff's shipments when defendant was refusing to furnish its own cars for that purpose. If such cars had been accepted defendant would have known without doubt that the cars were going forward to points in other States, and it would have been defendant's duty, according to its theory, to collect the interstate rate if the shipments were in fact interstate shipments. The refusal to furnish cars for plaintiff's shipments shows that the real purpose of the publication of the extortionate rates was to deter plaintiff from shipping ties. While plaintiff sought to avoid the payment of defendant's maliciously published rates it did so in a lawful way, and what it did was upheld by the Court of Appeals of Kentucky (*Louisville & Nashville Railroad Co. vs. Ohio Valley Tie Co.*, 148 Ky., 718). If that court erred defendant had a remedy in this court.

The defendant in fact acquiesced in plaintiff's claim that the delivery of the ties to the purchasers at Louisville made the shipment of such ties intrastate shipments, but in order to compel plaintiff to abandon that method of handling the ties, and to pay the interstate rates, it required the ties to be unloaded when they reached Louisville. Plaintiff asserted a right which defendant recognized, but defendant sought to compel plaintiff to abandon that right by imposing unlawful burdens upon the exercise of the right. There was no attempt on plaintiff's part to conceal the fact that the purchasers intended to move the ties over their own tracks to points in other States, and it was not necessary for defendant, therefore, to require the ties to be unloaded in order to police the shipments. Besides, as already suggested, the mere breaking of bulk could not change the character of the shipments.

The claim made for defendant, therefore, that its refusal to furnish cars to plaintiff or to accept the cars of other lines when tendered for plaintiff's shipments had no other purpose than to protect defendant's interstate rates is unfounded. The jury has found that those rates were wilfully and maliciously kept in effect with the knowledge that they were unreasonable and with the intent to injure plaintiff's business, and we must accept that finding as true. The defendant claims, in effect, therefore, that it had the right to impose upon plaintiff burdens otherwise unlawful for the purpose of forcing plaintiff to so handle its shipments that it could no longer have any ground to claim that they were intrastate shipments, in order that plaintiff might thus be compelled to pay defendant's maliciously published rates, which defendant knew that it would in the end have to refund to plaintiff to the extent that they exceeded the lumber rates. But defendant probably assumed that plaintiff would never be able to recover the amount which it was compelled by defendant to pay for transferring the ties from defendant's cars to cars of the Pennsylvania railroad.

Not only did the defendant know that the Interstate Commerce Commission had repeatedly held that the rates on cross-ties ought not to exceed the rates on lumber, but its president, Milton H. Smith, testified that the purpose of defendant in maintaining the extortionate rates on cross-ties was to prevent or hinder their movement. Mr. Smith, who was introduced as a witness by plaintiff, was asked the question:

> "Has it been your purpose, Mr. Smith, to prevent the movement of cross-ties off your lines?"

And in answer he said:

> "That has been the effect and tendency to keep the rate on ties as high as we could, to let them move out—if they moved at all—slowly" (Rec., p. 155).

This statement of defendant's president furnishes the key to all that defendant did. That, however, which in its

inception was merely an attack upon the business of buying ties became in the end also a personal controversy with plaintiff.

The claim made by counsel for defendant that the controversy between plaintiff and defendant related to rates alone is wholly without foundation. While the first blow struck by defendant at plaintiff's business was through the maintenance of unreasonable rates, yet when plaintiff found a lawful way to avoid the effect of that blow defendant used other instruments to accomplish the same malicious purpose.

The Court of Appeals of Kentucky said (Rec., pp. 214-215):

> "In the case at bar every act referred to was established beyond controversy, that is, they were not denied, and there was substantial admission that the purpose was to prevent or hinder the movement of cross-ties off its road, and this, of course, meant the elimination of appellee as a competitor, and the destruction of its business. Appellant seeks to shift the blame for these drastic and arbitrary orders, and its refusal to furnish to appellee the same accommodations and facilities it was furnishing to other shippers of other commodities, by saying it was necessary to do so in order to circumvent appellee in the various steps which it was taking to avoid these orders and escape the effect of appellant's rules and regulations. But when it is remembered that these orders and rules and regulations were aimed at appellee alone, and to thwart it in the business which it had a perfect right to carry on, it becomes apparent that appellee was only exercising in a lawful manner its right of self-defense against the death-blows, time and time again directed at it by appellant. Its right to every privilege and facility for shipment which it requested is recognized and established by law, and they were at the time being afforded to all shippers of other commodities."

ARGUMENT.

I.

The record presents no federal question, and the writ of error should be dismissed.

In his brief on motion to dismiss counsel for defendant states that he relies in this court on three federal questions. It is claimed by counsel that two of the questions arose on defendant's requests for instructions, and that the third question arose upon objections made to that part of the instructions given by the court which related to the refusal of defendant to permit its cars to leave its line.

The Court of Appeals of Kentucky did not consider any of defendant's requests for instruction or its objections to the instructions given, but by its assignment of errors defendant states that the court, by affirming the judgment, held, *in effect*, that the requested instructions were properly refused, and that the jury was properly instructed as to defendant's duty to permit its cars to leave its line.

(*a*) *The payment of the order of reparation as a bar.*— The first of the requested instructions does not state what the jury may consider but what it *must not* consider, and was on its face intended merely to supplement or explain the instructions given. The giving of those instructions, with the exception already noted, which is not important in this connection, is not assigned as error, and with that exception those instructions must be accepted as the law of this case. Besides, no federal question was raised by the formal objection made to the instructions given. It would have been error to give inconsistent instructions, and it cannot be assumed that defendant in requesting an instruction telling the jury *not* to consider certain things intended anything more than to ask the court to give the jury a caution or

warning. The requested instruction we are considering warns the jury not to "allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties." The court, by the instructions given, carefully observed the distinction which counsel for defendant observed in his requested instruction, and instructed the jury that one of the facts which, if found to exist, would authorize a verdict for plaintiff was that the rates condemned by the Commission were *wilfully and maliciously maintained* with intent to injure plaintiff's business. As showing the meaning and significance of the word *maintained* attention is called to the fact that the jury was authorized to find for plaintiff if it believed that the rates were wilfully and maliciously *maintained* with intent to *deter plaintiff* from buying ties. The plaintiff in its original petition and amended petitions very carefully observed the distinction between *charging and collecting* unreasonable rates and *wilfully and maliciously publishing and maintaining* unreasonable rates, and the defendant showed that it also recognized this distinction.

In its original petition, referring to the repeated rulings of the Interstate Commerce Commission to the effect that the rates on cross-ties ought not to exceed the rates on lumber made from the same kind of wood from which the ties are made, plaintiff alleged (Rec., p. 4):

> "But notwithstanding the fact that the Interstate Commerce Commission has many times and in all cases brought before said Commission, against the Louisville and Nashville Railroad Company, and other railroad companies, adjudged that it was and is extortionate and unconscionable for said railroad companies to charge more for hauling cross-ties in carload lots in interstate shipments than they charge for hauling lumber; and notwithstanding the fact that in all of the many cases brought before said Interstate Commerce Commission against the Louisville & Nashville Railroad Company, that Commission,

where it found that said railroad company had collected charges for hauling cross-ties in such shipments, in excess of the regular charges for hauling lumber in similar shipments, has ordered said railroad company to refund to the parties paying such excessive charges the amounts of so much of such charges as were in excess of the rates for hauling lumber, the *defendant has nevertheless wilfully, maliciously and persistently failed and refused and still fails and refuses to change the classification of cross-ties in its said interstate tariffs so as to take them from the fifth class and put them upon the lumber class, notwithstanding the fact that such change could be made in thirty days, or immediately with permission of the Interstate Commerce Commission.*" (Italics ours.)

The claim as to the intrastate rates charged, however, was based upon the fact that they were in excess of the established rates, and that the overcharges were *wilfully and maliciously withheld* from plaintiff, and as to those rates the plaintiff, after alleging that defendant wilfully and maliciously committed the acts thereinafter set forth, further alleged (Rec., pp. 2-3):

"Defendant did charge and collect and caused to be charged and collected as compensation for hauling eighty-nine carloads of cross-ties, shipped from stations on said lines of said railroad company in Kentucky to Louisville, Kentucky, unlawful and excessive freight rates—that is to say, defendant charged and collected the sum of $11,396.64 in freight charges, when in truth and in fact, the sum of $3,269.01 was the total sum properly owing for hauling said cross-ties, according to the rates regularly fixed in the duly published intrastate tariff of said railroad company, and when defendant knew that any charge in excess of $3,384.03 was unlawful and extortionate; and defendant refused and still refuses to refund the excessive sums charged and collected as aforesaid and plaintiff was compelled to bring suit and did bring suit, which is still pending, against said railroad company, to recover the amount of said excessive charges."

Defendant's special demurrer to the original petition was in two paragraphs, the first paragraph relating to that part of the petition which claimed damages, as defendant assumed, on account of the *collection* of unreasonable *intrastate* rates, and the second paragraph relating to that part of the petition which claimed damages on account of the *publication* of unreasonable *interstate* rates. As the defendant then recognized that distinction, we must assume that it was still in mind when defendant made its requests for instructions. Of course, the word *maintained* was used in the instructions in the sense of continued to publish and keep in effect, as the wilful and malicious refusal of defendant to withdraw or cancel its published tariffs was a wrong even though the tariffs may have been originally published in good faith. If counsel for defendant desired to raise the question that under the act to regulate commerce the *wilful and malicious maintenance* of rates did not create a cause of action separate and distinct from that created by the mere *collection* of rates he should have stated that as the ground of his objection to instruction No. 1 given by the court, and then assigned the giving of that instruction as error.

The *charging* of an unreasonable rate violates section 1 of the act to regulate commerce, which provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * * "

As defendant has acquiesced in the instructions given as being the law of the case to the extent that they relate to the *maintaining* of unreasonable rates, it is not necessary to consider whether or not the *maintaining* of unreasonable rates was a violation of the act to regulate commerce.

The ground stated for defendant's request for its first instruction asked had no application whatever to the only rates referred to in the instructions given by the court, since those rates *had been* condemned by the Interstate Commerce Commission as unreasonable and damages *had been* awarded by the Commission on account of the charging of those rates, whereas the ground upon which defendant's instruction was requested assumed that the rates referred to therein had not been condemned by the Commission and that no damages had been awarded on account of the charging of those rates. Counsel for defendant admitted in his brief on motion to dismiss that the ground stated by him for his requested instruction No. 1 was "inapt and incomplete" (p. 37), and insisted that instead of saying that the court had no "jurisdiction" to award damages on account of the charging of unreasonable rates "unless and until" the Interstate Commerce Commission had found the rates to be unreasonable and had assessed the damages he really *intended* to say that the Commission *had* found the rates to be unreasonable and *had* awarded damages on account of the charging of those rates, and that the damages so awarded had been paid. He further insisted that in stating that the court had no jurisdiction to award damages on account of the charging of those rates until the question as to the reasonableness of the rates had been submitted "by court" to the Interstate Commerce Commission he had said something which was meaningless, and that the court should disregard the words "by court." As counsel for defendant thus concedes that the words used by him to assert his federal right were not only "inapt and incomplete," but were meaningless, he cannot complain that the state court so treated them.

To give this court jurisdiction the federal right here relied upon must have been "unmistakably" claimed in the state court. In *Oxley Stave Co. vs. Butler County,* 166 U. S., 648, 655, the court, by Mr. Justice Harlan, after quoting section

709 of Revised Statutes regulating the jurisdiction of thi court upon writ of error to a state court, said:

> "The words 'specially set up or claimed' imply tha if a party intends to invoke for the protection of hi rights the Constitution of the United States or som treaty, statute, commission or authority of the Unite States, he must so declare; and unless he does so de clare 'specially,' that is, unmistakably, this court i without authority to re-examine the final judgmen of the state court. This statutory requirement is no met if such declaration is so general in its characte that the purpose of the party to assert a federal righ is left to mere inference."

It must also appear that the federal right claimed here i the same federal right specially claimed in the state court.

In *Seaboard Air Line Ry. vs. Duvall,* 225 U. S., 477, 487 the court in an opinion by Mr. Justice Lurton said:

> "It was the obvious duty of counsel, if they wished any particular construction of the Act to put the re quest in such definite terms as that the attention o the court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the Court."

In *Sweringen vs. St. Louis,* 185 U. S., 38, 46, upon which counsel for defendant relies, the court said that the claim of federal right must have been so referred to and mentioned as to show "that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court."

The court can know what was in the mind of the party claiming the federal right only by what he said at the time, and there is not a suggestion in the record that defendant, when it requested its first instruction, had any thought of claiming that the payment of the order of reparation pre cluded plaintiff from recovering the damages sought in this action. If the ground stated for the instruction had any

meaning, that meaning was that the action was premature, but counsel for defendant now claims that he had no thought of insisting that plaintiff should have gone to the Commission for additional damages. Omitting the words "by court" the ground stated for the instruction shows that defendant had in mind other rates than those which the Commission had condemned, and on account of the charging of which it had awarded damages, and as the only rates to which the instructions given referred were rates which had been condemned by the Commission and on account of the charging of which reparation had been awarded by the Commission, both the trial court and the Court of Appeals were warranted in concluding that there was no ground for giving the requested instruction. The words "by court," however, cannot be disregarded, and in fact they are essential to give any meaning to the ground stated, since it could be said that *the court* had never submitted to the Interstate Commerce Commission the question as to the reasonableness of the rates, but it could not be said that the question had not been submitted to the Commission at all. Counsel says that the court must know that the words "by court" have gotten into the record by error, but they do appear in the original bill of exceptions. Of course, the ground stated with those words included, raises a frivolous question.

While it is not necessary in all cases that the claim of federal right should be asserted by pleading it is necessary that the facts on which the claim is based should be properly brought to the attention of the state Court, and that it should appear to the court that the party asserting the federal right is relying on those facts. It appeared from plaintiff's amended petition that the Interstate Commerce Commission had made an award of reparation in plaintiff's favor, but it did not appear that the order of reparation had been paid, or that plaintiff was relying on the order or its payment as a bar. On the contrary, plaintiff clearly indicated its intention not to rely on the order or its payment as a bar or an estoppel.

Although the order of reparation, if valid, was conclusive as to the reasonableness of the rates (*Mitchell Coal Co.* vs. *Penna. R. R. Co.*, 230 U. S. 247, 258) defendant by its answer joined issue both as to the reasonableness of the rates and as to the amount of the damages, and thus not only attacked the very foundation of the order but elected to reopen all the matters which it now claims were closed by that order. If defendant intended to claim that the order of reparation was conclusive against plaintiff as to the amount of the damages it should have conceded that the order was conclusive against defendant as to the reasonableness of the rates. Section 16 of the Act provides that the order of the Commission "shall be *prima facie* evidence of the facts therein stated," and defendant never at any time in the State Court asserted the right to have the order of reparation in this case treated as *conclusive* evidence against plaintiff as to any fact stated in the order. If defendant was entitled to have the order treated as conclusive against plaintiff as to the amount of the damages it was so entitled only upon condition that the order be treated as conclusive against it as to the reasonableness of the rates, and when it denied that the rates were reasonable it waived its right to claim that the order of reparation was conclusive against plaintiff as to the amount of the damages.

We also ask the attention of the court to defendant's "motions to exclude testimony" offered at the close of plaintiff's testimony. By these motions the defendant asked that all testimony as to the charging of unreasonable rates and the damages resulting therefrom be excluded from the jury because the *sole* right and jurisdiction to determine the reasonableness of the rates and the amount of damage done to a shipper by reason of the charging of an unreasonable rate was in the Interstate Commerce Commission (Rec., pp. 176-177). There was no suggestion that the jurisdiction of the Interstate Commerce Commission had been exhausted, but rather an invitation to plaintiff to go to the Commission

for additional damages, thus clearly waiving any claim that there could be no further recovery because the Commission had already awarded to plaintiff all the damages to which it was entitled.

While we have referred to the motions to exclude testimony to show that defendant did not intend to rely on the payment of the order of reparation as a bar the defendant cannot now base any claim of federal right upon those motions since there was no objection to the testimony when offered, and the action of the trial court upon the motions was not assigned as a ground for new trial.

Referring to a certain part of the testimony which included some of that embraced in those motions, the Court of Appeals said (Rec., p. 215):

> "Appellant says it did not object to the testimony, because it did not then know how the court would instruct the jury with reference to it. But the practice for testing a ruling of the court, or the competency of evidence, is to object and except at the time."

And this is the established rule in Kentucky.

In *Berry vs. Evans,* 28 Ky. Law Rep., 22, 23, the court refused to consider alleged error in the admission of testimony because no objection was made *at the time* of its admission.

In *T. J. Moss Tie Co. vs. Myers,* 116 S. W., 255, there was an exception to the admission of testimony, but no objection, and the Court of Appeals of Kentucky said:

> "The evidence must be objected to at the time as well as excepted to."

While the court may in its discretion exclude testimony to the admission of which no objection was made, the general rule is that a party who failed to object to the admission of testimony at the proper time cannot complain if the court refuses to grant his motion to exclude. *Miller vs. Montgomery,* 78 N. Y., 282, 286; *State vs. Forsha,* 190 Mo., 296, 326.

In the instant case the only excuse which defendant offers for its refusal to furnish cars is the claim that plaintiff was seeking to evade its interstate rates, and if the testimony as to the rates be excluded defendant is without even the semblance of a defense to that part of the action which seeks to recover damages for refusal to furnish cars.

Some of the testimony as to rates, however, if competent for no other purpose, was competent to show malice, and if any part of that testimony was competent the court did not err in refusing to exclude the entire testimony embraced in the motions.

But the refusal of the court to exclude the testimony was not assigned as a ground for new trial, and for that reason could not be considered by the Court of Appeals of Kentucky.

In *Acme Mills & Elevator Co. vs. Rives,* 141 Ky., 783, 787, the court in an opinion by Judge Miller, now Chief Justice, referring to an alleged error occurring during the trial, said:

> "Unless the error of the circuit court is specifically made a ground for a new trial, it will be regarded as having been waived in that court, and is necessarily beyond the sphere of this court's supervisory jurisdiction, which is only to decide whether, on the grounds properly before it, the circuit court erred in its judgment."

Counsel for defendant relies upon *Meaux vs. Meaux,* 81 Ky., 475, 479, to show that his grounds for new trial were sufficient to call attention to the alleged error of the court in refusing to sustain his motions to *exclude* testimony, but in that case the testimony admitted was objected and excepted to at the time, and there was no motion to exclude. The only question, therefore, was whether or not it was necessary to set out the testimony in the motion for new trial or to describe it more specifically than by the statement that it was testimony the admission of which was "excepted" to at the time. The court did not hold that alleged error in admitting testimony was the same as alleged error in refusing to exclude testimony, or that testimony described as testimony objected to

at the time included testimony *not* objected to at the time.

Assuming, as we must assume, that the Court of Appeals of Kentucky failed to consider the alleged error of the trial court in denying defendant's motion to exclude testimony, not only because the testimony was not objected to when offered, but because that action of the court was not assigned as a ground for new trial, the claim of denial of federal right is not properly brought to the attention of this court, because the right was not claimed in the trial court as required by the state practice. *Louisville & Nashville Railroad vs. Woodford,* 234 U. S., 46, 51.

If, however, there were no other reason for disregarding the alleged error in refusing to exclude testimony the fact that the action of the Court of Appeals in failing to reverse upon that ground is not assigned as error in this court would be sufficient.

We also again ask the attention of the court to the statement made by counsel for defendant in support of its requests for instructions. Nothing could show more clearly than does that statement that the defendant never at any time relied or intended to rely in the trial court on the fact that plaintiff had elected to claim all its damages in the proceeding before the Interstate Commerce Commission or on the fatc that damages had been awarded by the Commission and paid. This is shown not only by the fact that defendant insisted that the court could not award the damages sought in this action "unless and until" the amount of the damage had been submitted by court to and determined by the Interstate Commerce Commission, but by the fact that the defendant did insist that the judgment recovered in the state court was a bar to the recovery of the damages sought on account of the rates involved in the action in which that judgment was rendered.

But a conclusive answer to the claim that the payment of the order of reparation may be here relied upon as a bar to any recovery on account of the charging of unreasonable rates is found in the fact that payment was not pleaded or

otherwise relied upon in the trial court, and that the Court of Appeals of Kentucky did not consider the claim that payment was a bar, if in fact such a claim was made in that court, which does not appear. The Court of Appeals stated that the claim was that the *order* was a bar, no reference being made to its *payment* in that connection (Rec., p. 218). It may have been that payment was accepted on express condition that it should not affect this action. Besides, as this action for additional items of damage was being prosecuted when payment was made, there could be no presumption of an intention to waive any claim asserted in this action. Proof of payment when there was no issue as to payment amounted to nothing. Since payment, as defendant now concedes, was essential to give the order of reparation the effect of a judgment as a bar it was manifestly necessary for defendant to plead payment if it intended to claim for the order of reparation such an effect. If there had been a plea of payment it may be that plaintiff could have pleaded an estoppel. Plaintiff had no right to *wilfully* do anything to increase the damages, and therefore it was bound to accept the money when tendered, or to forego the right to any damage which it might thereafter suffer by not having the use of the money.

But counsel for defendant insists that this was an action under section 16 of the act to enforce an order of reparation, and that as the petition did not state that the order of reparation had not been paid, it did not state a cause of action. No attempt was made to enforce the order of reparation, and the amended petition setting up that order shows that the pleader had no thought of recovering the damages included in the order. If defendant is right in supposing that the wrong complained of was a violation of the Act to Regulate Commerce this was an action for damages within the meaning of section 16, and while, if that be true, the action may have been premature in that the special damages sought to be recovered had not been assessed by the Commission, yet that objection was waived.

Darnell vs. Illinois Central R. R., 225 U. S., 243, 245,

was an action brought in a circuit court of the United States to recover damages on account of the charging of a rate which had previously been found by the Interstate Commerce Commission to be unreasonable, and the action was dismissed on the ground that the declaration failed to allege that plaintiff had made application for reparation to the Interstate Commerce Commission, and that this right to reparation had been sustained by that body. The court, by Mr. Chief Justice White, on motion to dismiss the writ of error, after stating the facts, said:

> "Under these circumstances it is clear that the question of whether the plaintiff was entitled to the relief prayed in the absence of an averment of previous action by the Interstate Commerce Commission involved merely the determination of whether there was a cause of action stated, and hence that under these circumstances this issue did not call in question the jurisdiction of the court below, as a federal court, becomes equally clear when it is considered that exactly the same question concerning the sufficiency of the averments to justify affording relief would have arisen for decision had the suit been pending in a state court of general authority having jurisdiction over the person. When the controversy comes to be rightly understood, it is obvious that its determination was within the scope of the jurisdiction of the court below, and that its decision on the issue presented is susceptible of being reviewed in the regular course of judicial proceeding and does not come within the purview of the authority to directly review in certain cases conferred upon this court by the act of 1891."

It is the established rule in Kentucky that the objection that an action is premature is waived if, without making the objection by demurrer or plea, the defendant pleads to the merits.

It was formerly the rule in Kentucky that a creditor could not sue to set aside a conveyance made by his debtor on the ground that the conveyance was made with the intent to defraud creditors "unless and until" the creditor had obtained

judgment and a return of *nulla bona,* and that rule being invoked by appellant in *Barton vs. Barton,* 80 Ky., 212, 214, upon appeal from a judgment setting aside such a conveyance, it was held that by joining issue on the merits without filing a demurrer to the petition the objection that there had been no return of *nulla bona* was waived. The court said:

> "This is unlike a case where the court has no jurisdiction of the subject-matter, for in such a case no consent can give jurisdiction; but here the court had jurisdiction to adjudge whether a conveyance or transfer of property was fraudulent, provided certain steps had been taken, and a failure to raise the question as to whether such steps had been taken is akin to submission of the person to the jurisdiction where there has been no service of process, which may, in all cases, be done when the subject-matter may otherwise be inquired of by the court."

Behan vs. Warfield, 90 Ky., 151, is to the same effect.

If the failure to have the damages assessed by the Commission could be waived by failure to demur to the petition, of course the failure to allege that the damages assessed had not been paid could be thus waived. Therefore, if this be regarded as an action under section 16 of the act it is immaterial whether the petition be considered as defective because it failed to show that the order of reparation made by the Commission had not been paid or because the additional damages had not been assessed by the Commission.

The contention that the petition was bad because it failed to allege that the order of reparation had not been paid implies that the order of reparation, if it had not been paid, would have furnished a basis for the recovery of the damages sought in this action, and this completely negatives the idea that there was any inconsistency between going to the Commission for the rate damages and going to the state court for the general damages resulting from the combination of malicious acts of which plaintiff complained. Besides, if the

order of reparation was merely the basis for the recovery of additional damages it was immaterial whether or not it had been paid.

All other questions aside, however, it seems too plain for argument that neither the order of reparation nor its payment could be a bar *to this action* even if the order of reparation without payment had the force and effect of a judgment, which we insist that it did not have. There were various elements of damage involved of which the Interstate Commerce Commission would have had no jurisdiction, and the contention that the payment of the order of reparation operated as a bar to the entire action is so untenable as to be frivolous.

The fact that defendant did not press in the Court of Appeals of Kentucky the alleged error of the trial court in refusing to give its first requested instruction shows that it then recognized that its request for that instruction did not present the question which it now insists was presented. That the alleged error in refusing to give that instruction was not urged in the Court of Appeals of Kentucky is confirmed by the fact that counsel for defendant in stating in his petition for rehearing what he terms his "federal question" did not refer to the refusal to give that instruction (Rec., pp. 243-246).

Besides, the claim made in the Court of Appeals that the order of reparation was a bar to the entire action was inconsistent with the ground stated for the requested instruction, and the defendant cannot, after taking that position in the Court of Appeals, now shift its position again and return to the position which it had taken in the trial court.

But the refusal of the state court to recognize the *order* of reparation as a bar to the action, is not assigned as error. The error assigned is that the court refused to hold that the recovery of additional damages was barred by the *payment* of the order of reparation (assigned errors 1, 2, 3, Rec., pp. 252, 253).

(*b*) *Jurisdiction of state court.*—By its special demurrer

to that part of the original petition alleging as an element of damage the "publication" of unreasonable interstate rates on ties defendant claimed that the *only* tribunal which had jurisdiction to give damages on account of the "publication" of unreasonable interstate rates was the Interstate Commerce Commission. The trial court sustained that demurrer, but not on the ground on which it was based, the reason given by the court being the fact that the rates in question had not been specifically condemned by the Commission (Rec., p. 22). The fact that the court did not sustain the special demurrer on the exact ground on which it was asked to do so gave defendant no ground to except, and there was in fact no exception on its part.

In *Steele vs. Bryant & Co.,* 132 Ky., 569, the court struck out certain parts of plaintiff's petition and the plaintiff excepted. On appeal the defendant complained of this action of the court on the ground that the effect was to make the remaining allegations broader than before, but the court held that as he had failed to except his complaint of the ruling could not be considered.

After the plaintiff filed its amended petition setting up the fact that the Interstate Commerce Commission had specifically condemned the rates, and had fixed the extent to which the rates were unreasonable, by making an order of reparation, the defendant, without further objection to the jurisdiction of the court, filed its answer denying that the rates were unreasonable or were wilfully or maliciously published or maintained. Testimony tending to show that the rates were wilfully and maliciously published with knowledge on the part of defendant that they were unreasonable was admitted without objection, and while defendant subsequently moved to exclude that testimony that motion came too late to entitle defendant to have the testimony excluded. Besides, the denial of the motion, as we have seen, was not assigned as a ground for a new trial, and is not here assigned as error. Defendant by the ground assigned for the motion

to exclude the testimony insisted merely that the Interstate Commerce Commission *alone* had "jurisdiction" to award damages, but counsel says he meant that the payment of the order of reparation already procured by plaintiff was a bar, and that being true the use of the word "jurisdiction" was inapt. Therefore, even if the alleged error in refusing to exclude the testimony were now before the court for consideration it could not be considered as raising the question of jurisdiction of the state court.

Counsel for defendant also insists that the ground assigned for defendant's first requested instruction was intended to assert the claim that the payment of the order of reparation was a bar to the recovery of additional damages on account of the charging of unreasonable rates, and so the request for that instruction did not raise the question of jurisdiction.

As that question was not raised in the trial court, and as the Court of Appeals of Kentucky made no reference to the question in its opinion, the question is not before this court. Counsel insists that jurisdiction of the subject-matter could not be waived, and while we insist that the state court did have jurisdiction of the subject-matter yet if we are wrong in that, objection to the jurisdiction *as a federal question* could be and was waived.

No objection at any time was made to the jurisdiction of the state court as distinguished from the federal court, and defendant, by its repeated claim that the Interstate Commerce Commission *alone* had jurisdiction, expressly denied the jurisdiction of the federal court. So far as appears from the record defendant preferred to have the cause tried by the state court. A plea to the jurisdiction is not good unless it gives a better writ.

In *Texas & Pacific Railway Co. vs. Saunders,* 151 U. S., 105, 109, the defendant in an action brought in the Circuit Court of the United States for the Eastern District of Texas pleaded that the defendant, if liable at all, was liable only on intervention in a certain proceeding in the United States

Circuit Court for the Eastern District of Louisiana, and that it appeared that it was then too late to intervene in that proceeding. The court overruled that plea, and judgment being rendered against defendant the case was brought on writ of error to this court. The court, by Mr. Chief Justice Fuller, after stating the facts upon which the plea referred to was based, said:

> "The plea was, therefore, not a plea to the jurisdiction, but a plea in bar. It did not seek to oust the jurisdiction of the Circuit Court for the Eastern District of Texas by reason of jurisdiction in the Circuit Court for the Eastern District of Louisiana or elsewhere, and so give the plaintiff a better writ, but to defeat his recovery altogether. We do not think this presented any question of jurisdiction, as such, which we could consider."

The state court did have jurisdiction of the subject-matter, even assuming that damages for a violation of the Act were sought (Darnell *vs.* Illinois Central R. Co., *supra*), and the objection that the action was premature was waived, as we have seen. But this was a common-law action in which no damages for a violation of the act to regulate commerce were claimed, and for that reason the state court alone had jurisdiction.

(*c*) *Refusal to instruct as to duty of carrier to collect published rate.*—Defendant's requested instruction No. 4 to the effect that it would have been a violation of law for defendant to collect any rate other than that published in its tariffs, was not relevant to any issue in the case. It is wholly immaterial that plaintiff would have been subject to a penalty if it had charged less than the published rate, when it had wilfully and maliciously published that rate for the purpose of putting itself in a position in which no other rate could be collected. The claim that defendant in all that it did was merely seeking to protect its published tariff was not made by defendant's answer, and was wholly un-

founded as we have seen, since there was no attempt to conceal the fact that the purchasers of the ties expected to move them as company material to points in other states, and it was the duty of defendant to collect the rate which was applicable. If, as counsel for defendant claims, the instruction was requested in order to rebut the presumption of malice which might otherwise arise from some of defendant's acts the request for the instruction did not present a federal question, but merely a question of evidence relating to one of the ingredients of a common-law action, and this court may not consider such a question, although the question may incidentally involve the construction of a federal statute. *Kizer vs. Texarkana & Fort Smith Ry. Co.,* 179 U. S., 199; *Seaboard Air Line Railway vs. Padgett,* 236 U. S., 668.

(*d*) *Refusal of defendant to permit its cars to leave its line.*—The alleged error in instructing the jury that it could allow damages on account of defendant's refusal to permit its cars to go into the possession of another railroad company was not considered by the Court of Appeals of Kentucky, nor did the defendant in its petition for rehearing in that court refer to the question, although it did undertake to state its "federal question" (Rec., p. 243). It also affirmatively appears that the question was not pressed upon motion for new trial in the trial court (Rec., p. 49). When the instruction of which the matter now complained of was a part was given by the court there was only a formal exception, and no attempt was then made to raise a federal question by that exception. The defendant by its answer stated merely that there had been no *uniform* custom in the matter of delivering its loaded cars upon the tracks of connecting lines, and did not deny that it frequently did for others what it refused to do for plaintiff, but it did deny that it had imposed any restriction upon plaintiff which it had not imposed upon other shippers with respect to *similar shipments.* The only issue made, therefore, related to the

similarity of plaintiff's shipments to the shipments to which the privilege in question was granted, and that was a question of fact for the jury. There was no suggestion in the answer that to require defendant to permit its cars to leave its line would deprive defendant of any constitutional right. If that defense had been made the plaintiff might have been able to show such a reciprocal arrangement between the defendant and its connecting lines as to the exchange of cars as would have been a complete answer to the claim made by the requested instruction. Besides, as the item of expense resulting from the refusal of defendant to permit its cars to leave its tracks was only a minor element of damage, it may be that the plaintiff would have requested the court to omit the part of the instructions now complained of if it had known that the objection to the instruction would be made the basis of a federal question. Where a federal right claimed goes to the foundation of the action it may be immaterial that the federal question is not raised until after the trial, but when the right affects merely a minor element of damage which the plaintiff might be willing to eliminate if he knew that the claim would be tested by federal laws and not by State laws, then it becomes important that both the plaintiff and the trial court should know before the case is submitted to the jury that the right is claimed as a federal right. If that be not true, the defendant may conceal his claim of federal right until after the verdict for the express purpose of entrapping the plaintiff, and laying the foundation for setting aside the entire verdict because of a minor error which would not have been committed if the right in question had been asserted as a federal right before the case went to the jury. The Court of Appeals of Kentucky did not pass upon the objection in question, and we may assume that it did not do so because the assertion of the federal right came too late. *Cox vs. Texas,* 202 U. S., 446.

Assuming that to be the reason for the state court's refusal

to consider the alleged error, no federal question is presented. *Brown vs. Massachusetts,* 144 U. S., 573; *Louisville & Nashville R. R. Co. vs. Woodford, supra.*

The federal question, however, if properly raised is so lacking in merit as to be frivolous. The mere fact that a carrier is required to permit its cars to leave its line does not show that it is deprived of any constitutional right. *Michigan Central R. Co. vs. Michigan R. R. Commission,* 236 U. S. 615, 631.

The claim made for defendant is, in effect, that a carrier may wilfully and maliciously discriminate against one shipper in favor of another in the matter of permitting its cars to leave its line, even when it has refused to accept the cars of another company tendered for the shipment, and that the shipper injured by such discrimination is without remedy.

There are many things which a carrier may refuse to do, but which if it does for one shipper it must do for all.

Missouri Pac. Ry. vs. Larabee Mills, 211 U. S., 612, 619, was an application by a mill company to a court of the State of Kansas for a mandamus to compel the Missouri Pacific Railroad Company to switch cars from the point of its connection with the Santa Fe to the plaintiff's mill in the town of Stafford, Kansas, and the judgment of the state court granting the mandamus having been affirmed by the Supreme Court of the State this court, on writ of error to that court, in an opinion by Mr. Justice Brewer, said:

> "The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission, or other administrative board was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of

> common carriers. Whenever one engages in that business the obligation of equal service to all arises, and that obligation, irrespctive of legislative action or special mandate, can be enforced by the courts."

Counsel for defendant says, however, that defendant did not permit its cars to go off its line for any shipper who was seeking to evade its interstate rates. But, as already said, the plaintiff paid the full rate for which it believed it was liable, and which the Court of Appeals of Kentucky subsequently said was the rate which applied to the traffic, and if it was liable for a higher rate it was the duty of defendant to collect that higher rate. The plaintiff cannot be charged with fraud in not paying a higher rate than the rate which the Court of Appeals of Kentucky found to be the rate applicable to its shipments, especially when the defendant acquiesced in that decision. Nor did defendant have the right, if the judgment of the state court was binding upon it, to defeat that judgment by imposing upon plaintiff annoying and expensive burdens and restrictions which it did not impose upon other shippers under substantially similar circumstances and conditions.

That ties shipped from other points in Kentucky to Louisville and there delivered to the Pennsylvania on its own tracks *as its own property* were intrastate shipments, although they were subsequently moved by that carrier *for its own use* to points in other States, seems clear, and the same is true of like shipments to the Big Four. If supplies sold in New York to defendant for delivery at Louisville, Ky., should be shipped to that point and there delivered to the purchaser, and the shipment should subsequently be moved by the purchasing carrier to some other point in Kentucky on its own line *for its own use,* the mere fact that the shipper in New York had reason to believe that such a movement by the purchaser *for its own use* would take place in Kentucky would not make that movement an interstate movement, and if that be true the movements here in question were not in-

terstate movements, so far as appears from this record. Waiving other differences, no case cited by counsel for appellant involved the movement by a carrier of its own material or supplies.

In *Rates on Railroad Fuel and Other Coal,* 36 I. C. C., 1, 8, upon authority of cases holding that the actual origin and destination of a shipment and not the billing determine whether the shipment is an interstate shipment or an intrastate shipment, the Commission held that a carrier could not select a particular point on its line as the fictitious destination of company material shipped to it from a point on another line and thereby procure a larger division of the through rate than it would be entitled to receive if the material had been billed to its real destination, but the Commission said:

> "In so deciding we are not unmindful of the principle that a carrier may transport its own material free of charge over its own line. Therefore we must not be understood to hold that carriers may not, if they so desire, and by proper handling, take possession of the coal at the junction point and transport it free over their entire line. However, if this is done, the local rate as the lawfully published proportional rate up to the junction points must be paid. *This method has much to commend it not only for fuel coal, but for all so-called company material.*" (Italics ours.)

This means, of course, that the transportation under published tariffs ends with delivery to the carrier which owns the property, and the decision of the Commission in the case last cited, when so interpreted, is not inconsistent with anything which this court held or said in *Penna. R. R. Co. vs. Clark Brothers Coal Co.,* 238 U. S. 456, 468, on which counsel for defendant relies to show that the shipments in question were interstate shipments. But all the facts necessary to enable this court to determine whether the shipments in question were intrastate shipments or interstate shipments are not here, as the record of the case in which the Court of

Appeals of Kentucky held that the shipments in question were intrastate shipments, although considered as read to the jury (Rec., p. 79), is not before this court, and even if that record were here this court could not in this case review that judgment of the Court of Appeals of Kentucky, especially as no federal question was raised as to that matter in the state court, and the assignment of errors does not present the question. Besides, it is immaterial whether the shipments for which defendant refused to furnish cars were intrastate or interstate shipments.

That it had been the universal custom of defendant prior to this controversy to deliver cars loaded with company material to the purchasing carrier and to permit that carrier to take the car forward without unloading was established by undisputed testimony (Rec., p. 107). Besides, defendant could not refuse to permit its own cars to leave its line when it had refused to accept the cars of the Pennsylvania tendered for that company's shipments. In any event, the alleged error could have affected only the item of $771.56 awarded by the jury for expense of transferring ties.

II.

The failure of defendant to file a plea in abatement was an independent non-federal ground broad enough to support the failure of the Court of Appeals of Kentucky to reverse for alleged error in refusing to give defendant's requested instruction relating to rates.

The failure to file a plea in abatement which the Court of Appeals of Kentucky found to be sufficient to estop defendant from relying upon the order of reparation as a bar is an independent non-federal ground which is sufficient to justify the refusal of the trial court to give defendant's first requested instruction to the effect that the jury could not allow any damages to plaintiff on account of

defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties.

The court held that as the proceeding before the Commission and this action were pending at the same time the defendant, if it intended to claim that both proceedings could not be maintained, should have filed a plea in abatement. This decision is based on a local question of pleading and practice not reviewable by this court, no attempt to avoid the federal question being apparent. *Vandalia Railroad vs. South Bend,* 207 U. S., 359; *Western Union Telegraph Co. vs. Wilson,* 213 U. S., 52; *Brinkmeier vs. Missouri Pacific Railway Co.,* 224 U. S., 268; *Louisville & Nashville Railroad vs. Woodford, supra.*

But even if the decision that the right claimed was waived by the failure to file a plea in abatement be reviewable it must be approved as being in line with the established practice both in Kentucky and other jurisdictions. *Louisville & Nashville R. R. Co. vs. Louisville Bridge Co.,* 116 Ky., 258, 268; *Gillen vs. Illinois Central R. R. Co.,* 137 Ky., 375; *New Orleans vs. Gaines,* 138 U. S., 595, 614; *Southern Pac. Co. vs. United States,* 186 Fed., 737, 742.

In *Louisville & Nashville R. R. Co. vs. Louisville Bridge Co., supra,* where the court held that after defendant had acquiesced in the prosecution of two separate actions arising out of the same transaction it could not plead the judgment in the one of the two actions as a bar to the other, the court said (p. 268):

> "If objection had been made to the separation of the cause of action, the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other."

But counsel for defendant says it would have been impossible by a *plea in abatement* to make the objection which it did make in the trial court and in the Court of Appeals

and which it now makes. If the order of reparation was a condition precedent to the right of plaintiff to maintain this action of course it could not be a bar, and the claim made in the Court of Appeals that it was a bar implied that it was not a condition precedent. Defendant could not after claiming before the order of reparation was obtained that such an order was a condition precedent then claim after the order was obtained that it was a bar. If plaintiff had sought additional damages on account of the mere *charging* of the rates, it may be that defendant, if it had accepted the finding of the Commission that the rates were unreasonable, could have offered the order of reparation in evidence as an estoppel as to the amount of the damages suffered by plaintiff on that account, but not as a bar to any part of the action. The claim made in the Court of Appeals of Kentucky for the first time that the order of reparation was a bar to the action implied that if that order had not been obtained plaintiff might have recovered in this action, and defendant having abandoned its original contention that the assessment of damages by the Commission was a condition precedent to this action, it will not be heard to say that when it was making that contention there was no room for an election. If defendant is to be permitted to shift its position it cannot be in a more favorable position when it has done so than it would have been if it had originally taken the position which it took in the Court of Appeals of Kentucky. If it had originally taken the position which it took in that court there would have been no reason why it could not have pleaded in abatement so much of the proceeding before the Commission as sought reparation.

A claim that the order of reparation *estopped* plaintiff to claim any greater amount as damages resulting from the charging of the unreasonable rates than the amount awarded by the Commission would not have been inconsistent with the claim that no action in the courts would lie until the amount of the damages had been fixed by the Commission,

but the claim that the order of reparation without payment was a *bar* to this action *was* inconsistent with the claim that no action in the courts would lie until there had been such an assessment of damages by the Commission.

On page 52 of his brief on the merits, counsel for defendant says:

> "If the shipper elects to go before the Commission and ask an award of damages from the Commission, he should be required to be satisfied if the award made in his favor is complied with."

This argument implies that plaintiff had a choice of remedies, and that if it had abandoned its right to recover the money maliciously taken from it by the defendant it would have had the right to maintain this action. That being the contention, there was room for a plea in abatement.

Not only was defendant estopped to plead the payment of the order of reparation as a bar, but it failed to rely in the trial court in any way upon the order of reparation or its payment.

In *Holtheide vs. Smith's Guardian, etc.*, 27 Ky. Law Rep., 60, 63, the Court of Appeals of Kentucky said:

> "Ordinarily the defense of *res judicata* is required to be presented by plea, but it may be raised by demurrer when the pleading demurred to presents, as in this case, the facts showing the former adjudication."

In *Louisville & N. R. R. Co. vs. City of Louisville,* 141 Ky., 131, 134, the court said:

> "The matter of *res adjudicata* can only be presented to the court by pleading."

In *United States vs. Bliss,* 172 U. S., 321, 326, upon appeal from the Court of Claims, the doctrine of *res judicata* was invoked to support the judgment appealed from, the former proceeding and judgment relied upon being intro-

duced into the record in this court by stipulation. The court said:

> "If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court."

That this court will either refuse to take jurisdiction or will affirm where there is an independent non-federal ground broad enough to support the judgment, is well settled.

In *Johnson vs. Risk*, 137 U. S., 300, where the defendants demurred upon two separate grounds, one of which involved the construction of an act of Congress and the other involved the bar of the statute of limitations of the State, and the Supreme Court of the State gave no opinion in affirming the judgment of the lower court sustaining the demurrer it was held that it could not be assumed that the judgment of the Supreme Court of the State was not based on the statute of limitations, that defense not being palpably unfounded, and that this was an independent non-federal ground broad enough to support the judgment.

In *Hammond vs. Johnston*, 142 U. S., 73, 78, the state court held that a sale under execution of land the legal title to which was in the United States passed to the purchaser an equity in the land which was owned by the execution defendant. The court also passed upon certain federal questions raised, saying that it did so in order that there might be no obstacle to a review of the judgment by this court. In dismissing the writ of error this court by Mr. Chief Justice Fuller said:

> "It is well settled that where the Supreme Court of a State decides a federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

In *Brown vs. Massachusetts, supra,* the court, by Mr. Justice Gray, held that the decision of the state court that objection to the jury which tried the plaintiff in error came too late after verdict was an independent non-federal ground upon which the judgment might be upheld regardless of the merits of the objection as a federal question, and that, therefore, this court had no jurisdiction. Many other cases are to the same effect.

III.

The defendant's first requested instruction was properly refused because there was no occasion for the caution or warning which the court was asked to give.

It does not appear that there was any evidence that could have authorized any damages on account of the mere charging of the rates as distinguished from the wilful and malicious maintaining of the rates other than the difference between the rates charged and the lumber rates, and that damage the jury was expressly instructed not to give.

No duty rested upon the court to give the instruction requested in the exact language in which it was offered, and as the court by instruction No. 5 gave the substance of defendant's requested instruction No. 1 the refusal of that requested instruction was not error.

The *normal* measure of damages for the *charging* of an unreasonable rate is the difference between the unreasonable rate and the rate which it is found would have been reasonable, and we do not believe any case can be found in which the Interstate Commerce Commission has ever given any other damages on account of the *charging* of an unreasonble rate, although it does now recognize that it must in a proper case give general damages (*Vulcan Coal and Mining Co. vs. I. C. R. R. Co.,* 33 I. C. C., 52). While the shipper is entitled to the *full damage* sustained, that means,

of course, the damages which are the *proximate* result of the wrong done.

In *Darnell-Taenzer Lumber Co. vs. Southern Pac. Co.*, 221 Fed., 890, 894, the Circuit Court of Appeals for the Sixth Circuit in an opinion by Circuit Judge Knappen, referring to the cases of *Penna. R. R. Co. vs. International Coal Mining Co.*, 230 U. S., 184, and *Meeker vs. Lehigh Valley R. R. Co.*, 236 U. S., 412, said:

> "We find nothing in either the International Coal Co. Case or the Meeker Cases conflicting with the view that damages resulting from the imposition of unreasonably excessive rates are *normally* measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to some one else. On the other hand, the charging of an excessive and unreasonable rate is *ipso facto* unlawful."

In *Baer Bros. vs. Denver & R. G. R. R.*, 233 U. S., 479, 488, this court assumed that "reparation" would be awarded as a matter of course on account of past unreasonable charges to the extent of the excess over reasonable charges. Referring to cases where what was an unreasonable rate in the past is found to be reasonable at the time of the hearing the court, by Mr. Justice Lamar, said:

> "In such a case reparation would be awarded for past unreasonable charges collected but no new rate would be established for the future."

If the carrier after collecting the unreasonable rate wilfully and maliciously withholds from the shipper the excess over a reasonable rate with intent to injure his business, that wrong is quite distinct from the wrong done by the mere charging of the rate.

The Immigration Act of Congress of February 20, 1907, c. 1134, sec. 19, 34 Stat., 904, provides a penalty against the owner of any steamship who shall make any "charge" for the return of any alien brought to the United States and not entitled to enter, or who shall take any security from him for the payment of such charge, and in *United States vs. Nord Deutscher Lloyd,* 186 Fed., 391, 394, the United States Circuit Court for the Southern District of New York, construing that provision in an opinion by District Judge Hand, held that to retain money taken in a foreign country was not a continuous repetition of the taking within the United States. The court, referring to the word "charge," said:

> "The word means some overt act by which the charging party manifests his purpose to demand the money charged from the party charged; it does not include the subsequent relations which are consequences of the act. In short, it is not a legal relation which continues wherever the two parties may come."

Where two shippers are charged the same unreasonable rate and the carrier at once joins with one of them in an informal request for permission to refund the excess over a reasonable rate, but maliciously refuses to join with the other in such a request, with intent to injure his business by tying up his capital, the injury to the latter shipper is entirely different in nature from the injury which the other shipper suffered, and cannot be said to have resulted from the *charging* of the rate, except to the extent of the excess over a reasonable rate.

So long as the defendant persisted in *maintaining* the unreasonable rates on cross-ties there could be no reparation except upon formal complaint, and we have seen that it required almost seven months to have a formal complaint heard and decided by the Commission. The general rule is that the Commission will not authorize a carrier upon informal complaint to make reparation to a shipper, without

requiring the reduced rate to be maintained for one year in the future, and where the carrier is unwilling to do that it becomes necessary for the shipper to file a formal complaint in order to obtain reparation.

In *Stone-Ordean-Wells Co. vs. C. B. & Q. R. Co.,* 16 I. C. C,. 30, 31, the Commission said:

> "These parties expressed the desire that the complaint be considered as informal in character, so that under the rules of the Commission relating to informal awards of reparation, the order establishing the rate for the future might be limited to a period of one year. Formal complaint was made necessary and formal hearing was required in this case by the attitude and action of defendants, and in accordance with the usual practice the defendants should maintain the rate prescribed as reasonable for a period of not less than two years."

The plaintiff in December, 1910, requested the defendant to issue new tariffs naming lumber rates on ties, and then to join with it in a request to the Commission for permission to refund freight charges already paid to the extent of the excess over the lumber rate, but this the defendant refused to do (Rec., p. 87). The tying up of plaintiff's capital resulted, therefore, from the *maintaining* of the rates and not from the *charging* of the rates.

The only damage which is allowed for the failure to comply with a contract to pay money is interest. *Insurance Co. vs. Piaggio,* 83 U. S., 378, 386; *Loudon vs. Shelby County Taxing District,* 104 U. S., 771, 774.

It would seem, therefore, that where a carrier in good faith publishes and collects a rate which it believes to be reasonable it ought not to be liable for any greater damage for withholding from the shipper in like good faith the excess over a reasonable rate until the Interstate Commerce Commission has found the rate to be unreasonable than it would be liable for it if it had failed to comply with a contract to pay the money to the shipper. It is only for *wilful* violations of the

Act to Regulate Commerce that carriers are subject to penalties (section 10). It is not claimed for defendant that there was any evidence before the jury of any damage resulting from the *charging* of the rates other than that which the jury was expressly instructed not to give, except that which resulted from the malicious withholding from plaintiff of money to the use of which it was entitled; and, besides, it does not appear that any damage would have resulted from that act alone. It follows, therefore, that the refusal to give the requested instruction was not error.

IV.

Neither the procurement by plaintiff of the order of reparation from the Interstate Commerce Commission nor the acceptance by plaintiff of payment of that order operated as a bar to this action.

A. It was the established rule of the Interstate Commerce Commission at the time the order of reparation was procured not to take jurisdiction of claims for such damages as were recovered in this action, and it cannot be assumed that the Commission decided the matters here involved.

In *Joynes vs. Penn. R. R. Co.*, 17 I. C. C., 361, the Interstate Commerce Commission held that it would not take jurisdiction of claims for damages other than for the difference between an unreasonable rate charged and the rate found by the Commission to be reasonable, which difference was termed "rate damages."

In *Charles Becker vs. P. M. R. R. Co.*, 28 I. C. C., 645, 657, decided December 8, 1913, after this case was tried, referring to two questions, the latter of which related to the complainant's right to "tort or general damages as distinguished from rate damages," the Commission said:

> "Considering these questions in the reverse order, it is to be observed that as to the general damages the

> defendant raises the question of the Commission's jurisdiction, and at the hearing made no showing regarding the damages, but reserved the right to apply for further hearings if the Commission should take jurisdiction. The question of jurisdiction we have discussed in *Joynes vs. Pa. R. R. Co.*, 17 I. C. C., 361, and more recently in *Hillsdale Coal & Coke Co. vs. P. R. R. Co.*, 23 I. C. C., 186. In the present case we shall do no more than to refer to our conclusions in these cases, since apart from the jurisdictional question we believe that here there should be no award of damages of this nature."

It cannot be said *with certainty* that the particular matter in controversy in the proceeding before the Commission was anything more than the right of plaintiff to recover of defendant the freight charges collected by defendant to the extent they exceeded what the charges would have been if the lumber rates had been applied, while the matter in dispute in this action was the amount of the damages which had resulted from the *malicious maintenance* of the unreasonable rates combined with various other malicious acts of defendant. The two causes of action, therefore, were not the same, and the order of reparation, if conclusive at all, was conclusive only as to matters which were in fact decided by the Commission, and not as to matters which might have been decided. *Russell vs. Place,* 94 U. S. 606; *Last Chance Min. Co. vs. Tyler Mining Co.,* 157 U. S. 683, 687; *De Sollar vs. Hanscome,* 158 U. S. 216, 221.

In determining what matters were in fact decided in the former proceeding resort must be had to the record in that proceeding, and the judgment will not operate as an estoppel unless the court can say *with certainty* that the former action or proceeding could not have been decided without deciding the exact matter in controversy in the pending action. *In Russell vs. Place, supra,* the court by Mr. Justice Field said (p. 610):

> "According to Coke, an estoppel must 'be certain to every intent'; and if upon the face of the record any thing is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded and nothing conclusive in it when offered as evidence."

The record before the Commission is not here, and there can be no presumption that the Commission took jurisdiction of any claim for damages other than the claim for rate damages or that plaintiff did not specifically ask merely for the recovery of the amount wrongfully held by defendant. No obligation rested upon plaintiff to apply for a mandamus to compel the Commission to take jurisdiction of the claim for damages asserted in this action, even if the Commission could have been compelled to do so, but plaintiff was warranted in accepting the established rule of the Commission as the law and in going into the courts to recover such damages.

In *Borcherling vs. Ruckelshaus,* 49 N. J. Eq., 340, the court held that where a court of law refused to permit the defendant to rely upon an estoppel upon the ground that only a court of equity could consider that defense the defendant was warranted in accepting that ruling as the law of that case and in setting up the estoppel in a court of equity as ground for setting aside the judgment rendered against him in the court of law, although he might have prosecuted an appeal from that judgment and assigned as error the refusal to permit him to set up the estoppel.

In *Michels vs. Olmstead,* 157 U. S., 198, referring to the fact that a certain writing was not intended as a contract, the court, by Mr. Justice Gray, said (p. 201):

> "It is suggested in the brief for the appellant that if such was the fact, it should be set up in an action at law, and be tried by a jury. But the conclusive answer to the suggestion is, that evidence of this very fact was offered in the action at law, and excluded, upon his objection, as incompetent in that action; and that he is thereby estopped now to assert that it could or should be availed of at law."

The principle of these cases applies here if defendant is right in supposing that this is an action to recover damages for a violation of the act to regulate commerce, since if any objection was made to the jurisdiction of the state court that objection was based on the ground that the Interstate Commerce Commission alone had jurisdiction.

The cases cited also show the reason for the rule requiring that the defendant who intends to rely on a judgment as a bar shall in some way give notice of that fact, since otherwise the plaintiff would have no opportunity to plead an estoppel.

B. The Interstate Commerce Commission did not have jurisdiction of the claim for damages asserted in this action, and plaintiff, by going to the Commission for reparation, did not abandon its right to such damages.

This was not an action to recover damages for a violation of the act to regulate commerce, but a common-law action against a common carrier to recover damages for wilful and malicious injury to a shipper's business. The mere fact that one of the instruments maliciously used by the carrier was an abuse of a right or privilege given to the carrier by that act is immaterial. The action was in the nature of an action for an assault on plaintiff's business, and the character of the instruments used does not affect the nature of the action. The blows and the resulting injury created the right of action. As there were at least some of the acts complained of on account of which the Commission would have had no jurisdiction to give damages, it had no jurisdiction to give damages for the injury resulting from the combination of acts. The wilful refusal of the carrier to furnish cars or to accept cars of other carriers for plaintiff's shipments was a breach of a common-law duty of which the Commission had no jurisdiction, especially when that refusal applied to intrastate shipments and interstate shipments alike. *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.*, 223 U. S. 70; *Pennsylvania Railroad Co. vs. Puritan Coal Mining Co.*,

237 U. S., 121; *Illinois Central R. R. Co. vs. Mulbery Hill Coal Co.*, 238 U. S. 275.

It would have been impossible to separate the damage which resulted from the wilful and malicious publication and maintenance of unreasonable rates from that which resulted from the wilful and malicious refusal to furnish cars, as both resulted in preventing plaintiff from making shipments and also in tying up plaintiff's capital and thus injuring its credit, and it could not be said that either alone would have caused those injuries. Besides, the plaintiff was entitled to have a jury pass upon the matter of exemplary damages, it not being within the province of the Commission to give such damages. *Eichenberg vs. Southern Pacific Co.*, 28 I. C. C., 584, 588.

In answer to this argument counsel for defendant relies upon *Penna. R. R. Co. vs. Clark Brothers Coal Co.*, 238 U. S., 456, 472, where it was held that the plaintiff, after going to the Interstate Commerce Commission and procuring an order condemning as unjustly discriminatory the distribution of cars by the carrier and an award of damages on account of such discrimination, could not then go into a state court and recover treble damages under a state statute.

In that case the carrier did not hold money maliciously taken from the shipper, and which the shipper could not recover in the state court without first going to the Commission. Besides the damages recovered in the state court in that case were given on account of the same acts for which the Interstate Commerce Commission awarded damages, while in the instant case plaintiff sought damages in the state court on account of acts for which the Commission had not awarded, and had no jurisdiction to award, damages.

The wilful and malicious withholding from plaintiff of the excess over the lumber rates after that money was collected was not a violation of the statute, but even if it was the plaintiff did not recover any damages resulting from that act alone. Besides, no federal question was predicated

upon that act. The injury to credit and to business resulted from a combination of malicious acts, of which the Commission would have had no jurisdiction, while the counsel fees resulted from the wilful and malicious refusal of defendant to cancel its unreasonable rates, making it necessary for plaintiff to employ counsel to have those rates condemned. It was alleged in the petition that when defendant published its extortionate rates on cross-ties it contemplated that plaintiff would have to pay counsel fees to obtain reparation, and intended to inflict that injury on plaintiff (Rec., p. 10), and it was not denied that defendant contemplated that plaintiff would have to pay reasonable counsel fees to obtain reparation, the denial being merely that it intended "to impose upon plaintiff the burden of paying such attorneys' fees" (Rec., p. 41). But the matter of counsel fees is not now before this court, as defendant has raised no federal question as to that item of damage. Of course, plaintiff's right to recover counsel fees was asserted as a common-law right on the ground that this was a damage foreseen and intended.

As this action, therefore, is not an action to recover damages for a violation of the act, it is not controlled by the case of *Penna. R. R. Co. vs. Clark Brothers Coal Co., supra.*

The order of reparation merely fixed with precision the extent to which the freight charges were unreasonable and the extent to which defendant was authorized to make payment. If we had not gone to the Commission for reparation we would have been compelled to go to a federal court for that relief or abandon our right to reparation, and neither the Commission nor the federal court could have given the damages recovered in this action. If the argument of counsel for defendant be sound a shipper who has been charged an unreasonable rate which was maliciously published with intent to destroy his business and has suffered damage from that malicious publication of the rate in connection with other malicious acts of the carrier must abandon either his right to

recover the excess over a reasonable rate which is wrongfully held by the carrier or his common-law right to recover damages for the injury to his business which has resulted from the malicious publication of the rate in connection with the other malicious acts of the carrier. But the two rights are in no way inconsistent, and section 22 of the act, which provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," clearly preserves to plaintiff both rights.

It would be an anomaly if a shipper from whom a carrier has collected an unreasonable rate which was maliciously published with intent to injure the shipper's business could have no remedy for the injury to his business resulting from that act in connection with other malicious acts without abandoning his right to recover the money maliciously taken from him by the carrier.

C. The malicious maintenance of rates which the carrier knows to be unreasonable with intent to injure a competitor's business gives a common-law right of action.

The courts of the country differ as to whether or not an act otherwise not actionable may give a right of action because it was done with bad intent, but the question presented in the trial court in the instant case was whether or not unlawful acts gave a right of action for the recovery of damages which were foreseen and intended and could not otherwise have been recovered, and that question the courts seem to uniformly answer in the affirmative.

A tariff is in the nature of process provided by law for the collection of a carrier's rates, and when a railroad for the purpose of injuring the business of a competitor abuses the privilege which the law gives it of issuing a tariff and collecting whatever rate it may publish, however unreasonable that rate may be, it commits a wrong akin to that which is committed by one who maliciously procures an attachment

for the purpose of injuring the business of another, maliciously prosecutes an action for that purpose, and t all such wrongs give a common-law right of action is w settled.

In *Woods vs. Finnell,* 76 Ky. (13 Bush), 628, 633, court said:

> "In cases where the plaintiff has mistaken his tion, or has been non-suited, or where, by reason some imaginary claim, he has seen proper to sue defendant, it is not pretended that any action damages can be maintained; but where the clain not only false, but the action is prompted alone malice and without any probable cause, the defe ant's right of recovery, for the expenses incurred damages sustained, should be as fully recognized a his property had been attached or his body ta charge of by the sheriff.
>
> "While the damages may be less in the one than the other, the legal right exists and some rem should be afforded. If the facts alleged in these p tions are true, and they must be so treated on murrer, it would be a singular system of jurisprude that would admit the wrong and still withhold **remedy."**

The court in that case allowed counsel fees as a part of damages which resulted from the malicious act of the fendant in the prosecution of the action which he knew t unfounded.

In *Lawrence vs. Hagerman,* 56 Ill., 68, 76, the court s

> "It is insisted that an action on the case for liciously suing out a writ of attachment cannot maintained. The objection proceeds on the gro that, inasmuch as the statute requires the plai in attachment to give bond, with security, co tioned to pay all damages in case the writ is wr fully issued, before obtaining the process, the rem is confined to an action on the bond. We think objection taken is not tenable, certainly not to extent insisted upon by the counsel. The reme

> by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law."

In *Dunshee vs. Standard Oil Co.,* 152 Iowa, 618, 626, after stating that the defendant, Standard Oil Co., had the right to compete for business with plaintiff, the assignor of the Crystal Company, the court said:

> "If, however, there was no real purpose or desire to establish a competing business, but under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people."

In *Tuttle vs. Buck,* 107 Minn., 145, it was held that the establishment of a barber shop for the malicious purpose of destroying plaintiff's business as a barber was actionable.

In *Southern Railway Company vs. Chambers,* 126 Ga., 404, the court held that malicious injury to plaintiff's business as a licensed drayman gave a right of action.

In *Schonwald vs. Ragains,* 32 Okla., 223 (39 L. R. A., N. S., 854) it was held that unfair competition whereby the business of plaintiff was injured gave a right of action.

In *Aikens vs. Wisconsin,* 195 U. S., 194, which involved the constitutionality of a statute of Wisconsin imposing imprisonment or fine on "any two or more persons who shall combine for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by

any means whatever," the court, by Mr. Justice Holmes, after citing cases to the effect that the justification of an act may depend upon the end for which the act was done, said (p. 204):

> "It is no sufficient answer to this line of thought that motives are not actionable and that the standard of the law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen."

Again the court said (p. 206):

> "No conduct has such an absolute privilege as to justify all possible schemes of which it may be a part. The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law."

But counsel for defendant says that the fact that defendant may have maliciously refused to cancel its extortionate rates is beside the question, because the plaintiff might have gone to the Interstate Commerce Commission sooner than it did, and procured from the Commission an order requiring defendant to reduce its rates on cross-ties. The fact is that plaintiff made repeated requests of defendant to give cross-ties the same rates as lumber and defendant refused those requests (Rec., pp. 84, 87, 88). It is also true that plaintiff filed its complaint with the Commission September 15, 1911, and did not get relief until seven months later, during which time it suffered much of the damage of which it here complains. The argument is that although defendant maliciously refused to cancel rates which it knew to be unreasonable, and which it might have canceled at any time, yet that as plaintiff was guilty of laches in not proceeding sooner to compel defendant to do that which it knew it ought to do, and which for the malicious purpose of injuring plain-

tiff's business it had refused to do, even after plaintiff had filed its complaint, the defendant is not liable.

Plaintiff knew that it *might* require several months to procure an order from the Interstate Commerce Commission condemning the rates complained of, and it was not until defendant gave unmistakable evidence of its malice in the summer of 1911 that plaintiff ceased to hope that it would heed the repeated warnings that had been given by the Interstate Commerce Commission. The defense of contributory negligence was not made by the answer, and plaintiff was given no opportunity to meet that issue. If, however, plaintiff could be regarded as negligent in failing sooner to file a complaint before the Commission, it is well settled that one who has wilfully injured another cannot complain that the injured person did not exercise ordinary care to avoid the consequences of the injury.

In *Shannon vs. McNabb*, 29 Okla., 829, 834, where plaintiff sued to recover damages for injury to his crop of cotton, resulting from the wrongful act of defendant in driving cattle into his field the court said:

> "The continuing character of the wrong which was knowingly perpetrated upon plaintiff, taken in conjunction with the wilfulness of its perpetration, and considering that it was such as the law denounced as a crime, in our judgment relieved plaintiff of any duty to minimize the damages which defendants were inflicting, but entitled him to stand on his rights and hold the tort-feasors to full accountability, and this rule is especially applicable where a trespasser profits by his tort."

Judge Gordon, of the trial court, in his opinion overruling the motion for new trial found that the defendant in this case had profited by its malicious acts (Rec., p. 52).

In *Niagara Oil Co. vs. Ogle*, 177 Ind., 292, 301, the court, by Chief Justice Morris, held that the plaintiff owed no duty to take steps to reduce the damage to his land and crops from a nuisance maintained by defendant.

In *Galveston, Harrisburg & San Antonio Ry. Co. vs. Zantzinger,* 92 Texas, 365, 371, the court, by Chief Justice Gaines, held that the plaintiff owed defendant no duty to use ordinary care to avoid the consequences of personal injuries inflicted by defendant's wilful act. The court said:

> "Since one who has committed an assault and battery upon another cannot urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damages, that the plaintiff might have prevented them, at least in part, by careful conduct on his part."

D. Injury to business resulting from a series of malicious acts gives a right of action separate and distinct from that which exists for the injury done by any one of those acts.

In *Boyce vs. Odell Commission Co.,* 107 Fed., 58, the United States Circuit Court for the District of Indiana, in an opinion by District Judge Baker in an action to recover money alleged to have been lost in gambling on options, said:

> "A series of wrongful acts all aiming at a single result and contributing to the injury complained of, to wit, the destruction of one's business credit, and reputation may be counted on collectively as producing that result in an action on the case." Citing *Oliver vs. Perkins,* 92 Mich., 304.

In *Fagg's Admr. vs. L. & N. R. R. Co.,* 111 Ky., 30, the court held that separate and distinct acts of negligence which were alleged to have caused the death of plaintiff's intestate should have been included in a single paragraph of the petition, and that it was not necessary or proper to divide the petition into two paragraphs.

The case at bar does not differ in principle from that case. Here various malicious acts of the defendant contributed, and were intended to contribute, to the injury of plaintiff's

business just as the various acts of negligence complained of in the Fagg case contributed to the death of plaintiff's intestate, and just as it was impossible in that case to determine how far each act of negligence contributed to the death, so it is impossible in this case to determine just how far each of the malicious acts complained of contributed to the injury of plaintiff's business.

In *Standard Oil Co. vs. Doyle,* 118 Ky., 662, it was held that plaintiff was entitled to recover damages for injury to his business resulting from a series of wanton and malicious acts committed by defendant for the purpose of inflicting the injury complained of.

In *Julian, etc., vs. Pilcher,* 2 Duvall, 254, the court held that an action to enforce a lien to secure a note was not for the same cause as an action at law to recover a personal judgment on the note. The court said:

> "The note, it is true, furnishes a necessary part of the ground or cause of action in each case. But, in one case, the note and its non-payment, when due, made up the whole cause of action, while in the other, the existence and validity of a lien are additional facts, essential to the cause and maintenance of the action."

To the same effect is the case of *Black vs. Lackey,* 2 B. M. 257.

As said by the Circuit Court of Appeals for the Eighth Circuit in *Harrison vs. Remington,* 140 Fed. 385:

> "The test of the identity of causes of action is the identity of the facts essential to maintain them."

By the first motion which defendant made in the trial court it asked the court to require the plaintiff to paragraph its petition and to state as a separate cause of action each of the wilful and malicious acts alleged in the petition and the injury resulting therefrom. The trial court overruled the motion upon the ground that the various wilful and

malicious acts alleged, with the injury to business and property resulting therefrom, constituted jointly a single cause of action, which was not severable (Rec., pp. 13-14). That action of the trial court was not relied upon as error in the Court of Appeals of Kentucky, and is not assigned as error here, although the Court of Appeals did hold that the various wilful and malicious acts alleged jointly constituted a single cause of action.

An important element of damage was the injury to plaintiff's credit which resulted from the persistent effort of defendant to destroy its business, and the existence of that element of damage illustrates the futility of attempting to apportion to each of defendant's malicious acts the injury which resulted from that act. It appears that one loan of $40,000 was withdrawn from plaintiff because of the assault by defendant upon its business (Rec., p. 116), and it would be impossible to say that any one of defendant's malicious acts alone would have caused that injury.

E. It does not follow that the causes of action in two cases are the same because they originate in the same transaction or series of transactions.

In *Walker vs. Mitchell,* 18 B. M., 541, the Court of Appeals of Kentucky held that the plaintiff, who had in an action to recover land elected to sue also for damages for the detention of the land, was precluded by the judgment in that case from subsequently recovering damages of any kind for the detention of the land, which might have been recovered under the allegations of her pleading in that case, but the court said:

> "But in this case the plaintiff claimed in her petition a right to recover for the extraordinary expenses incurred in her action for the recovery of the land, and as these expenses could not well have been recovered in that action, and were not set up or embraced in the petition in terms, or by any fair or

reasonable construction, she could not, as to those expenses, have been barred by the former recovery; it results, therefore, that the court below erred in giving judgment in bar of the claim to recover the reasonable fees she had paid, or was bound to pay to counsel for services in and about the recovery of the land; but as to all else besides this claim the judgment was correct."

Such extraordinary expenses were recoverable in this action not only for reasons similar to those there given, but also because it was necessary to prove in order to authorize their recovery that the defendant acted in bad faith in maintaining the unreasonable rates. In that view of the case *Bramlette cs. L. & N. R. Co.*, 113 Ky., 300, and another case of the same style, 24 Ky. Law Rep., 976, are in point. In those cases the court held that the pendency of an action to recover damages for the negligent operation of live-stock pens or a judgment for such damages was not a bar to an action to recover damages for the injury which would have resulted even if the stockpens had been prudently and carefully operated. It seems that in those cases the operation was always negligent, and yet the plaintiff was permitted to recover in one action the damages which would have resulted if the operation had been prudent, and in the other the additional damages which resulted by reason of the negligence. The court treated one action as in the nature of an action to recover the value of property taken, and the other as an action to recover damages for a tort, thus introducing a new element.

The case of *Crockett vs. Miller,* 112 Fed., 729, decided by the United States Circuit Court of Appeals for the Eighth Circuit, illustrates the distinction between the recovery of damages which flow proximately from the violation of the statute and the consequential damages resulting from a wilful and malicious abuse of the process given to the carrier by the statute for the collection of its rates and arising

out of facts specially pleaded. The case cited was an action against a sheriff to recover damages for wilfully and maliciously levying an execution upon plaintiff's property with intent to destroy her business credit and standing. The court held that the action was analogous to one for the malicious abuse of civil process, and that a recovery by plaintiff of the property wrongfully seized, together with the damages resulting from the unlawful detention of the property, was not a bar to an action for extraordinary damages arising out of facts specially pleaded. The court, in an opinion by Judge Adams, said (pp. 735-736):

> "As a result of a careful examination of many cases, not only those to which our attention is called by defendants' counsel, but many others to which we have given critical attention, we think the rule may be safely stated as follows: That the only damages which can be recovered by plaintiff in an action of replevin under the statutes of Nebraska as construed by the Supreme Court of that State, where the property has been delivered to the plaintiff, are interest on the value of the property during the time plaintiff is deprived of its possession, the injury or damage done thereto by the officer in taking the same and while in possession thereof, and, in some cases, the usable value or the value of the use of the property while so detained. This we believe to be the New York doctrine, and is substantially the doctrine of the State of Nebraska, as we understand the decisions.
>
> "Accordingly it follows that the collateral or consequential damages occasioned by a seizure of property by the officer against whom the replevin suit is brought, such as injury to the business reputation, credit and standing of the plaintiff occasioned by the malicious conduct of the officer making the seizure, coupled with the express purpose and intention of so injuring the plaintiff, are not within the purview of the statutory damages flowing from the unlawful detention of property, within the meaning of replevin acts. They are totally different from them, in that they do not flow proximately from the

act of detention merely, but are special and consequential damages, arising out of facts specially pleaded in this case showing an intention to inflict them.

"It is more obvious that the other element of damages, namely, the attorney's fees and expenses of the plaintiff in asserting her claim and defending her title to the property seized by the sheriff could not have been introduced into the replevin suit. It was for services rendered and expenses incurred in that suit that the plaintiff was damaged, and, in the absence of some statutory provision permitting recovery therefor in the suit itself, it is obvious that if the necessary prerequisite element of malice existed she was required to institute another and different suit therefor. The trial court limited plaintiff's right of recovery in this action to such damages as she might have sustained by reason of loss of business credit and by reason of expenses incurred in the prosecution of the replevin suit, carefully withdrawing from the jury any consideration of damages occasioned by reason of the detention itself of the property. There was no exception taken to the court's direction with respect to damages. In other words, it was conceded at the trial that, if plaintiff was entitled to recover at all, she was entitled to recover the two items last alluded to. For the foregoing reasons, the defendants' contention that the claim asserted in this action is *res adjudicata* cannot prevail.

"For like reasons, also, there is, in our opinion, no merit in the theory of estoppel, by splitting the cause of action, as argued by defendants' counsel. If the damages resulting to plaintiff's business standing and credit, as a consequence of the malicious conduct of the sheriff, could not have been recovered in the replevin suit, surely the plaintiff should not be punished for not attempting to do so."

In *Talcott vs. Friend,* 179 Fed., 676, the Circuit Court of Appeals for the Seventh Circuit, in an opinion by Circuit Judge Baker, held that one who proved a claim in bankruptcy for the price of goods sold to the bankrupt was not precluded from bringing an action for deceit based on false

representations made by the bankrupt upon the faith o which credit was given.

In *Glaspie vs. Keator,* 56 Fed., 203, the Circuit Court o Appeals, Eighth Circuit, in an opinion by District Judg Thayer, held that the satisfaction of a judgment agains plaintiff's agent for the amount he had received as a secre profit from one from whom plaintiff had purchased lan relying upon the agent's false representations as to the valu of the land did not operate as a satisfaction of a judgmen in plaintiff's favor against the same agent for damages o account of the deceit.

In *Hansen vs. Taylor,* 108 Ga., 567, it was held that a judgment in plaintiff's favor for the amount he had paid t defendant as a part of the purchase price of property which defendant had subsequently taken from him by force wa not a bar to an action by plaintiff to recover damages grow ing out of the unlawful seizure of the property.

In *Weeks vs. Edwards,* 176 Mass., 453, plaintiff sought partition of land, claiming one-fifth by descent. He then filed suit to establish a resulting trust, claiming that he had paid a part of the purchase price of the land and claiming an additional interest on that account. The former action, which was still pending, was pleaded in abatement. The court, in an opinion by Chief Justice Holmes, now Mr. Justice Holmes of this court, held that the actions were not inconsistent. The court said:

> "The plaintiff has a legal title to one-fifth. It is consistent with this that he should have an equitable right to a larger share."

F. The demand was not an indivisible one, and that part of the demand here sued on had not accrued when the claim was filed before the Commission.

In its opinion in this case the Court of Appeals, referring to the action in the state court for a mandatory injunction, said (Rec., p. 221):

> "As above stated the action in the state court was in equity, and to secure extraordinary relief in the way of shipping facilities and to recover special damages. At that time appellant's malignant purpose was not apparent, and the greater damage in the way of a destroyed business had not been sustained. The same is true of the complaint filed with the Interstate Commerce Commission for damages due to violation of that statute."

We have a finding, therefore, by the state court that the damages awarded in this case had not accrued at the time the complaint before the Interstate Commerce Commission was filed, and this finding of fact is not assigned as error. But even if it were assigned as error it would have to be accepted as correct, no attempt to avoid the federal question being apparent.

In *Telluride Power Co vs. Rio Grande, etc., Ry.*, 175 U. S., 639, where rights to the use of water for mining purposes under a federal statute depended upon "priority of possession," it was held, in an opinion by Mr. Justice Brown, that the question of fact decided by the state court as to which party had priority of possession was not a federal question, but was merely preliminary to, or the possible basis of, such a question, and that, therefore, the writ of error must be dismissed. Many other cases are to the same effect. *Henderson Bridge Co. vs. City of Henderson*, 141 U. S., 679; *Telluride Power Co. vs. Rio Grande Western Ry. Co.*, 187 U. S., 569.

It being established, therefore, that the damages here sought to be recovered had not been sustained when the complaint before the Commission was filed the payment of the order of reparation is not a bar to this action.

Cross vs. United States, 14 Wall., 479, 484, was a proceeding by Cross as assignee of a lease to recover rent alleged to have been due from the United States, and the Court of Claims having denied relief because the assignment of the lease was defective Congress passed an act waiving that de-

fect, whereupon the case was reheard and the relief granted. Thereafter Cross filed a petition to recover a subsequent installment of rent under the same lease, and the former recovery being pleaded in bar the court said:

> "It is true the lease was at an end when Congress acted and the court reheard the cause, and Cross could by proper amendment to his petition have embraced also that portion of his demand for which he now sues; and that would have been the proper course for him to have pursued, but he was not compelled to take it. In covenant for non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable. As this suit is for instalments of rent not due when the first suit was instituted, and as they were not included in it in any stage of the proceeding, the plea of former recovery has no application."

The same principle applies to torts. In *Esty vs. Baker,* 48 Me., 495, it was held that the continuance of a building on another person's land, even after the recovery of damages for its erection, was a trespass, for which an action would lie.

In *Leland vs. Marsh,* 16 Mass., 389, 391, the court held that every continuation of a false imprisonment is a new trespass.

The same principle was applied in *Oliver vs. Illinois Central R. Co.,* 25 Ky. Law Rep., 235.

It may be said that, having gone to the Commission for a part of our damages, we should have gone to the Commission for additional damages, but counsel for defendant insists that he did not raise that question. If he did attempt to raise the question, however, he did so only by his first requested instruction, and he was then too late. The objection, if made, was to the effect that the action was premature, and it is well settled in Kentucky, as we have seen, that the defendant by failing to file a demurrer to the petition waives that objection. As the question, if raised, was not decided by the Court of Appeals it must be presumed that the

court ignored the question for the reason that under the established practice in Kentucky the objection was waived.

CONCLUSION.

We have discussed the liability of defendant for damages resulting from the malicious maintenance of rates with intent to prevent plaintiff's shipments from moving, and with intent to injure plaintiff's business, as if that question were now presented by the record, but as defendant raised no federal question by its exception to the instructions given by the court to the extent that they related to that liability, and the approval of that part of those instructions by the Court of Appeals of Kentucky is not assigned as error, that question is not before the court.

As stated in the beginning, the two principal grounds upon which defendant asks a reversal are: (1) That the *payment* of the order of reparation is a bar to this action; (2) that the state court had no jurisdiction of this action.

Neither of these questions was presented to or considered by the trial court, and neither question was decided by the Court of Appeals. The other grounds upon which defendant relies for reversal, as we have shown, are wholly without merit. We ask, therefore, that the writ of error be dismissed or the judgment affirmed.

Respectfully submitted,

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